(2) (3)

Supreme Court, U.S.
FILED
AUG 4 - 2003
OFFICE OF THE CLERK

Nos. 02-1773, 02-1778

IN THE

# Supreme Court of the United States

DO GEUN OH, ET AL.,

*Petitioners,*

VS.

MITSUI & CO., LTD., ET AL.,

*Respondents.*

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ZHENHUAN MA, ET AL.,

*Petitioners,*

VS.

KAJIMA CORPORATION, ET AL.,

*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## Question Presented

Whether the Ninth Circuit correctly held that a 1999 California statute purporting to create a private right of action on behalf of "Second World War forced labor victim[s]" is preempted under the foreign affairs doctrine as recently explicated by this Court's decision in *American Insurance Association v. Garamendi*, where the United States' foreign policy – exemplified in its drafting, negotiation and ratification of the multilateral Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169 – has already resolved the war and all war-related claims as a matter of United States law, including consigning such claims by Korean and Chinese nationals to diplomatic resolution.

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Mitsui Engineering & Shipbuilding Co., Ltd. has no parent corporation, and no publicly traded company owns 10% or more of its stock.

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publicly held company owns more than 10% or more of Showa Denko K.K.'s stock.

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DO GUEN OH, ET AL.,

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MITSUI & CO., LTD., ET AL.,

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ZHENHUAN MA, ET AL.,

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v.

KAJIMA CORPORATION, ET AL.,

*Respondents.*

## RESPONDENTS' BRIEF IN OPPOSITION

This Court should deny the *Oh* and *Ma* petitions for a writ of certiorari.[1] The judgment of the U.S. Court of Appeals for the Ninth Circuit correctly holds that a California statute creating a cause of action for conduct of Japanese nationals in Asia during World War II is preempted

[1] Two certiorari petitions were filed by petitioners in seven cases. Petition 02-1773 (*Oh*) includes *Kim v. Ishikawajima Harima Heavy Indus., Ltd., et al.* (01-17197); *Sin v. Mitsui & Co., Ltd., et al.* (01-17203); *Choe v. Nippon Steel Corp., et al.* (01-17211); and *Oh, et al., v. Mitsui & Co. Ltd., et al.* (01-17251). Petition 02-1778 (*Ma*) includes *Ma v. Kajima Corp., et al.* (01-17201); *Sung v. Mitsubishi Corp., et al.* (01-17207); and *Su, et al., v. Mitsubishi Corp., et al.* (01-17243).

by the core federal power to make and resolve war, which the United States "already exercised" when it "resolve[d] the war, including claims arising out of it," in the multilateral Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169 ("Allied Treaty" or "Treaty"). *See* Appendix to Petition for Certiorari of the *Oh* petitioners ("*Oh* Pet. App.") at 24a, 27a. The Ninth Circuit's ruling is supported by the *amicus curiae* position of the United States below.[2]

The *Oh* and *Ma* petitions rely on a decision of a different Ninth Circuit panel, which this Court reversed in *American Insurance Ass'n v. Garamendi*, 123 S. Ct. 2374 (2003) just three weeks after the petitions were filed. *Garamendi* held another World War II-related California statute to be preempted under the foreign affairs doctrine by virtue of Executive agreements aimed at resolving claims arising out of World War II in Europe.

Here the federal interest – the exercise of the war powers through a peace treaty – is even stronger than in *Garamendi*, and is in direct conflict with the state statute, whose only purpose is "to redress wrongs committed in the course of the Second World War." *Oh* Pet. App. at 23a. As the Ninth Circuit recognized in distinguishing its own earlier decision, which was subsequently reversed in *Garamendi*, these factors make this a clear case for foreign affairs preemption. No conflict exists among the U.S. Courts of Appeal or state courts of last resort with respect to the foreign affairs preemption issue raised by the petitions.

The statute, section 354.6 of the California Code of Civil Procedure, is also invalid for other reasons not reached by the Ninth Circuit. Among these are California's lack of legislative jurisdiction to create a cause of action for events

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[2] The Brief for *Amicus Curiae* the United States of America, filed with the Ninth Circuit on June 6, 2002, appears at respondents' Appendix F.

that occurred beyond its borders, on behalf of persons such as petitioners who, at the time of the events, were all foreign nationals having no ties to California or the United States. Petitioners had no right to sue in U.S. courts a half century ago and they have none now. The petitions should be denied.

## Opinions Below

The pertinent opinion of the Court of Appeals is that reported at 324 F.3d 692 (9th Cir. 2003) and not, as the *Oh* petition asserts, the amended and superseded opinion reported at 317 F.3d 1005 (9th Cir. 2003). *Oh* Pet. at 1. The version of the opinion attached to the *Oh* petition is, however, the correct one.

## Pertinent Constitutional Provisions, Treaties and Statutes

*Constitution of the United States*

> The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . .
>
> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; . . . .

U.S. Const. art. II, § 2, cls. 1, 2.

> The Congress shall have Power To . . . provide for the common Defense . . .;
>
> To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

> To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
>
> To raise and support Armies . . .;
>
> To provide and maintain a Navy;
>
> To make Rules for the Government and Regulation of the land and naval Forces . . . .

U.S. Const. art. I, § 8, cls. 1, 10-14.

> No State shall enter into any Treaty, Alliance, or Confederation; [or] grant Letters of Marque and Reprisal . . . .
>
> No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with . . . a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

U.S. Const. art. I, § 10, cls. 1, 3.

*Treaties*

The Allied Treaty appears at respondents' Appendix A.

The Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Cooperation, Japan-Republic of Korea, June 22, 1965, 583 U.N.T.S. 258 ("Japan-Korea Treaty"), appears at respondents' Appendix B.

The Treaty of Peace Between China and Japan, Apr. 28, 1952, 38 U.N.T.S. 1858 ("Japan-ROC Treaty"), appears at respondents' Appendix C.

The Joint Communiqué of the Government of Japan and the Government of the People's Republic of China, Sept. 29,

1972 ("Joint Communiqué"), appears at respondents' Appendix D.

The Treaty of Peace and Friendship Between Japan and the People's Republic of China, Aug. 18, 1978 ("Japan-PRC Treaty"), appears at respondents' Appendix E.

*Statutes*

Section 354.6 of the California Code of Civil Procedure is set forth in full in the Ninth Circuit's opinion. *See Oh* Pet. App. at 10a-12a.

## Statement of the Case

Petitioners and the classes they claim to represent[3] were all foreign nationals and nonresidents of the United States at all relevant times.[4] All rely on section 354.6 of the California Code of Civil Procedure, enacted in 1999, which creates a cause of action for persons allegedly forced to labor during World War II by, or in areas occupied by, "the Nazi

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[3] No class has been certified; putative class members allegedly number in the "thousands" or "hundreds of thousands." ER 7 (*Kim* Complaint); ER 39 (*Choe* Complaint); ER 94; (*Sin* Complaint); ER 120 (*Oh* Complaint); ER 75 (*Sung* Complaint); ER 151 (*Su* Complaint); ER 245 (*Ma* Complaint).

"ER" refers to the Excerpts of Record filed jointly in the U.S. Court of Appeals for the Ninth Circuit by the *Oh* and *Ma* groups of petitioners. "SER" refers to the Supplemental Excerpts of Record filed jointly in the Ninth Circuit in the *Oh* and *Ma* cases by respondents.

[4] Although the *Oh* petitioners generally are referred to as "Koreans" in this brief, they actually were subjects of Japan at all relevant times; Japan annexed Korea in 1910, and Korea became independent only after World War II. ER 11 (*Kim* Complaint); ER 43 (*Choe* Complaint); ER 123 (*Oh* Complaint). The *Ma* petitioners were Chinese nationals at all relevant times. ER 68-69 (*Sung* Complaint); ER 143-45 (*Su* Complaint); ER 237-39 (*Ma* Complaint).

regime or its allies," which, petitioners allege, include Japan.[5]

**A. Background**

Because petitioners' claims are bound up in the prosecution and conclusion of World War II in Asia, it is essential (as the courts below recognized) to understand the foreign policy that the United States formulated, incorporated into the Treaty and persuaded 47 other Allied Nations to adopt. Of special importance are the Treaty's requirements that claims of Korean nationals be resolved, not by litigation, but through "special arrangements" between the governments of Japan and Korea, art. 4(a) (which eventuated in the Japan-Korea treaty), and that Japan conclude treaties with Korea and China on "substantially the same terms" as the Allied Treaty, including the latter's resolution of war-related claims, art. 26 (which eventuated, in the case of China, in the Japan-ROC Treaty, the Joint Communiqué and the Japan-PRC Treaty). *See* App. A at 3a, 19a-20a.

The United States viewed a "free, prosperous and democratic Japan" as "an important stabilizing influence in the Far East" in the face of "mount[ing] international tensions" in that region. SER 545-46 (S. Exec. Rep. No. 82-2). Convinced that peace would be jeopardized "if the treaty validated, or kept contingently alive, monetary reparation claims against Japan," the United States convinced its Allies that "it is our duty not to dwell on the past, but to turn our eyes toward the future." SER 304, 309 (Record of Proceedings of the Conference for the Conclusion

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[5] Respondents are Japanese companies and certain of their contemporary U.S. subsidiaries. The latter are sued not for their own acts, but for the alleged acts of their Japanese parents – in most cases for acts of purported *predecessors* of their parents. *See, e.g.*, ER 36 (*Choe* Complaint); ER 118 (*Oh* Complaint); ER 71 (*Sung* Complaint); ER 147-48 (*Su* Complaint); ER 239-40 (*Ma* Complaint).

and Signature of the Treaty of Peace with Japan (1951) ("Proceedings")).

The Treaty's reparations provisions were premised on the recognition that it "would have been a short sighted policy and would certainly have laid the foundation of a lasting resentment" to leave Japan and its nationals open to future war-related claims. SER 311 (Proceedings). Consistent with the well-settled principle that "*reparations for war losses is a . . . matter to be settled between governments*" and "it is the . . . *responsibility of each government to provide such compensation for persons under its protection as that government deems fair and equitable* . . . out of reparations that may be received from Japan or from other sources," SER 556 (S. Exec. Rep. No. 82-2), the United States negotiated and crafted a Treaty that conclusively provided for resolution of all war-related claims.[6]

Allied signatories of the Treaty were accorded specified reparations and waived all further claims of their own and their nationals against Japan and its nationals (and vice versa). App. A at 10a-17a (arts. 14-19); *see generally* Brief of Respondents in Opposition to the petitions for a writ of certiorari filed in *Tenney, et al., v. Mitsui & Co., Ltd., et al.* (02-1776) and *Saldajeno, et al., v. Ishihara Sangyo Kaisha Ltd., et al.* (02-1784) ("Signatory Brief"). The funds to pay these reparations came principally from assets of Japanese businesses and individuals located in Allied and neutral nations. App. A at 10a-15a (arts. 14(a), 16); *see generally* Signatory Brief.

Although Korea could not sign the Treaty "because [it] was never at war with Japan," the Treaty "in many ways, treat[ed] Korea like an Allied Power," "obtain[ing] for Korea Japan's formal recognition of Korea's independence, and

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[6] Emphasis in quotations is added throughout this brief, unless otherwise specified.

Japan's consent to the vesting in the Republic of Korea, of the very considerable Japanese property in Korea," and placing Korea "on a parity with the Allied powers as regards . . . commercial arrangements." SER 305 (Proceedings).

Because of disagreement among the Allies as to which "China" should sign the Treaty – Nationalist or Communist – neither did. SER 305 (Proceedings). Nevertheless, "[t]he Treaty preserve[d], in full, the rights of China as one of the Allied Victors," by, *inter alia*, awarding China all Japanese property in Chinese territory. *Id.* at SER 306. At the same time, the United States insisted that China's nonparticipation not defeat the policy of achieving final resolution of all war claims; "it would . . . be *wrong, cruel and stupid to penalize Japan* because there is civil war in China and international disagreement regarding China." *Id.* at SER 305.

While acknowledging that nonsignatory nations, particularly Korea and China, had suffered enormously from "Japanese aggression," SER 304, 305 (Proceedings), the United States concluded that requiring reparations from Japan "in any proportion commensurate with the claims of the injured countries and their nationals" would be "contrary to the basic purposes and policy of the free nations, the Allied Powers, *and the United States in particular*." SER 555 (S. Exec. Rep. No. 82-2). Peace "would be impossible if the Treaty kept alive the right[s] of the [injured countries] to demand monetary reparations payments." SER 424 (Memo, Sec'y of State to President, Aug. 7, 1951). Accordingly, article 26 of the Treaty obligated Japan to conclude separate treaties with Korea and China "on the same or substantially the same terms" as the Allied Treaty, SER 289-90, including the latter's reparations provisions. *See* App. A at 10a-13a (art. 14); *see generally* Signatory Brief. Article 4(a) also directed that "claims. . . of [Korea] and [its] residents against Japan and its nationals, *shall be the subject of special arrangements between Japan and*

*[Korea]*," App. A at 3a, thus mandating that Korean nationals' claims "be resolved through inter-governmental agreements rather than litigation." App. F at 54a.

Faithful to the Allied Treaty, Japan negotiated the Korea-Japan Treaty and, consistent with U.S. foreign policy, three agreements with China: one with the Republic of China (the Japan-ROC Treaty) and, later, two with the People's Republic of China (the Joint Communiqué and the Japan-PRC Treaty). As discussed in sections I.B.2. and II.B. *infra*, these treaties also address reparations and independently preclude adjudication of petitioners' claims.

**B. Petitioners' Allegations**

Petitioners admittedly have never had any contact with California, except for a handful who emigrated after World War II. None of the conduct underlying their claims occurred in California, or even in the United States. Petitioners allege that their forced labor was in furtherance of the Japanese war effort.[7] Several of the complaints' details attest to the Japanese Government's deep involvement in the forced labor regime, *e.g.*, through laws and government directives requiring companies to use forced labor to achieve Japan's war aims,[8] and through the use of police and other government agencies to dragoon forced laborers.[9] Some

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[7] *See, e.g.*, ER 34 ("To assist *in the war effort* the Japanese government directed that Korean Nationals be forcibly deported and put to work by Japanese industry."); *see also* ER 36 ¶ 10, 52 ¶ 60; ER 2, 4; ER 67; ER 93; ER 123; ER 142; ER 235-36.

[8] *See, e.g.*, ER 43-44 ("National General Mobilization Law directed . . . authorities to 'draft Imperial subjects and make them serve the purposes of general mobilization.'"); ER 12 ("[T]he Japanese Cabinet . . . prescribed . . . numbers of Koreans . . . deported for forced and slave labor and detailed allocations [of laborers] to particular industries.").

[9] *See, e.g.*, ER 98 ("[Plaintiff] was raided by a policeman and an officer of the [regional] office while asleep in [his] home, . . . handcuffed [,] . . . taken to a gathering place . . . , and was transported to Japan forcibly."); ER 12 ("Japanese Welfare Ministry issued a directive

(continued ...)

complaints allege that respondents' predecessors "turned over" petitioners' wages to the Japanese Government, which never remitted the money to petitioners.[10]

### C. Proceedings in the District Court

The Judicial Panel on Multidistrict Litigation consolidated petitioners' cases in the U.S. District Court for the Northern District of California, along with 21 others based on section 354.6. SER 16-23, 265-67, 578. That court dismissed all 28 cases, holding section 354.6 unconstitutional "because it infringes on the exclusive foreign affairs power of the United States."[11] *Oh* Pet. App. at 52a, 73a.

The District Court had the benefit of a Statement of Interest of the United States, explaining the Treaty's negotiating and legislative history, U.S. foreign policy underlying it, and the Treaty's status as the cornerstone of U.S. Far Eastern policy over the last half century. The court was also provided with a *Note Verbale* from the Government of Japan to the United States. Both governments explained that section 354.6 would frustrate the operation of the Treaty – which contemplated resolution of all war claims by "state-to-state negotiations" – and would "jeopardize relations between the United States and Japan and Japan and its Asian neighbors." SER 517, 520 (U.S. Statement of Interest); *see* SER 525 (*Note Verbale*).

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(... continued)
that confirmed that the forcible deportation of Koreans was systematic and calculated.").

[10] *See* ER 10; ER 42; ER 97.

[11] The District Court also ruled that petitioners' other claims were all time-barred. *Oh* Pet. App. at 82a, 84a. That ruling, affirmed by the Ninth Circuit, *id.* at 32a-35a, is not challenged in the certiorari petitions.

**D. The Court of Appeals Decision**

The Ninth Circuit affirmed the District Court's judgments in all 28 consolidated cases.[12] Like the District Court, the Ninth Circuit had the benefit of the views of the United States, which supplemented its Statement of Interest with an *amicus curiae* brief and presented oral argument on the Treaty and U.S. foreign policy issues.

In its analysis, the panel expressly distinguished an earlier decision of a different panel – later reversed by this Court in *Garamendi* – in *Gerling Global Reins. Corp. v. Low*, 240 F.3d 739 (9th Cir. 2001). *Low* involved another World War II statute enacted by California, the Holocaust Victim Insurance Relief Act, Cal. Ins. Code §§ 13800-13807 ("HVIRA"). HVIRA, unlike Section 354.6, did not create a private right of action; rather, it required insurers doing business in California to provide disclosure about policies sold to persons in Europe, which were in effect between 1920 and 1945. The panel deciding the present cases recognized that the basis for preemption is much stronger for section 354.6 than for HVIRA. While section 354.6 has no purpose except "to provide a monetary remedy for decades-old wartime wrongs," *Oh* Pet. App. at 31a, HVIRA was a "forward-looking regulatory statute" that "merely" required disclosure and at least purported to safeguard contemporary consumer interests. *Id.*

In assessing where the line between federal and state power is to be drawn in the context of a law to remedy war-related injuries, the Ninth Circuit considered that, of the eleven clauses of the Constitution dealing with the foreign affairs powers of the President and Congress, seven

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[12] In addition, the Ninth Circuit affirmed dismissal of *Deutsch* v. *Turner Corp.*, No. CV 00-4405 SVW (AJWX), 2000 WL 33957691 (C.D. Cal. Aug. 25, 2000), which alleged World War II wrongs by German, not Japanese corporations. No certiorari petition was filed in *Deutsch*.

enumerate war powers, including "settling war." *Oh* Pet. App. at 21a. Conversely, "[m]ost of the Constitution's express limitations on States' foreign affairs powers also concern war." *Id.* The court found that the power "to resolve war, including the power to establish the procedure for resolving war claims" is "part of the inner core" of the "foreign relations power that is denied to the states." *Oh* Pet. App. at 20a-21a. It also noted that the state statute struck down by this Court in *Zschernig v. Miller*, 389 U.S. 429 (1968), although not by its terms war-related, "was seen by a Court operating at the height of the Cold War as a potential provocation to foreign powers." *Oh* Pet. App. at 21a-22a.

The Ninth Circuit went on to note that the federal government had "already exercised its own exclusive authority to resolve" World War II, "including claims arising out of it," by the ratification of the Allied Treaty. *Oh* Pet. App. at 24a, 27a. As the parties agreed, that resolution neither created "a private right of action against Japan or its nationals" nor authorized "states of the United States to create such a right." *Oh* Pet. App. at 27a. Because section 354.6 would "modify" that resolution, the court held that the statute was preempted. *Oh* Pet. App. at 27a-28a & n.14. This holding did not depend on the nationality of any particular plaintiff who might invoke section 354.6 in a U.S. court; accordingly, it was "immaterial" that petitioners were citizens of nations that did not sign the Treaty. *Oh* Pet. App. at 28a n.14.

Petitioners requested rehearing and rehearing en banc, which were unanimously denied on March 6, 2003. No active judge requested a vote on rehearing en banc, although two of the *Low* panel members are active judges. *Oh* Pet. App. at 41a. Nevertheless, the Ninth Circuit held issuance of its mandate pending this Court's decision in *Garamendi*.

After this Court decided *Garamendi* on June 23, 2003, the *Ma* petitioners asked the Ninth Circuit to reconsider its

decision. The Ninth Circuit denied the request for reconsideration and issued its mandate on July 30, 2003.

## Argument

### I. Because the Ninth Circuit's Decision Accords with *Garamendi*, the Petitions Should Be Denied

The Ninth Circuit's decision is fully consistent with *Garamendi* – indeed, had the Ninth Circuit not invalidated section 354.6, *Garamendi* would require reversal. Preemption is required under either, or both, preemption theories discussed in *Garamendi* – the "field" theory *Garamendi* identified as the basis of the majority opinion in *Zschernig* and the "conflict" theory of Justice Harlan's *Zschernig* concurrence. *Garamendi,* 123 S. Ct. at 2388-89. As *Garamendi* explained, under the "field" approach, *all* "state action with more than incidental effect on foreign affairs is preempted, even absent any affirmative federal activity in the subject area of the law, and hence *without any showing of conflict*." *Id.* at 2388 (citing *Zschernig*, 389 U.S. at 441; *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941); *United States v. Belmont,* 301 U.S. 324, 331 (1937); and *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316-19 (1936)). "Conflict" preemption requires an actual conflict between state law and a federal foreign policy interest. *Garamendi*, 123 S. Ct. at 2389.

*Garamendi* found it unnecessary to make a "categorical choice" between the two theories; there was a "sufficiently clear conflict" between the federal policy and state law in that case to result in preemption. *Id.* at 2389-90. The Court further observed that no such choice may be necessary in other cases, or, indeed ever, for the two theories "can be seen as complementary." *Id.* at 2389 n.11. Thus, "field preemption might be the appropriate doctrine" where a state "take[s] a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility," while "it might make good sense to require a

conflict" where "a state has acted within" its "'traditional competence,' but in a way that affects foreign relations." *Id.* (quoting *Zschernig*, 389 U.S. at 459 (Harlan, J., concurring)).

The Ninth Circuit also did not explicitly choose one preemption theory, nor did it need to.[13] As shown below, either theory could apply here and, under either analysis, section 354.6 is invalid.

### A. As Applied to Respondents, Section 354.6 Is Preempted Under the "Field" Theory Described in *Garamendi*

#### 1. This Case Presents Precisely the Circumstances That Make Field Preemption "the [A]ppropriate [D]octrine" Under *Garamendi*

*Garamendi* teaches that field preemption may be "the appropriate doctrine" where a state acts in the area "of foreign policy with no serious claim to be addressing a traditional state responsibility." 123 S. Ct. at 2389 n.11. Here California has fashioned its own war reparations cause of action and can make no "serious claim" that it is addressing a "traditional state responsibility" – not even one with the "tangential relation to present-day" regulatory objectives asserted (albeit unsuccessfully) to justify the statute struck down in *Garamendi*. *Id.* at 2394.[14]

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[13] This Court has previously held that the "categories of preemption are not 'rigidly distinct.'" *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 373 n.6 (2000) (quoting *English* v. *Gen. Elec. Co.*, 496 U.S. 72, 79 n.5 (1990)). "Indeed, field pre-emption may be understood as a species of conflict pre-emption: A state law that falls within a pre-empted field conflicts with Congress' intent (either express or plainly implied) to exclude state regulation." *English*, 496 U.S. at 79 n.5.

[14] In seeking rehearing of *Garamendi*, even California has stressed that "HVIRA is simply a disclosure statute that does not force the payment of any claim" and that the conduct that prompted it is the "*present* refusal of companies to disclose," *Am. Ins. Ass'n* v. *Garamendi*,

(continued ...)

As the Ninth Circuit correctly recognized, section 354.6 permits suit "*only*" by "'*Second World War* slave labor victims'" and "'*Second World War* forced labor victims.'" *Oh* Pet. App. at 23a (quoting § 354.6(b)). The "wrong-doers under the statute" – "'the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies or sympathizers'" – were, "by definition, wartime enemies of the United States," or at least "were operating in enemy territory . . . with the consent and for the benefit of our wartime enemy." *Id.* (quoting § 354.6(a)(1), (2)). By enacting section 354.6, California plainly sought "to create its own resolution to a major issue arising out of the war – a remedy for wartime acts that California's legislature believed had never been fairly resolved." *Id.*

Since this country's founding, the law has been clear: resolution of war claims is for the federal government to address through treaties or other state-to-state agreements. *Ware v. Hylton*, 3 U.S. (Dall.) 199, 229-30 (1796) (compensation for losses sustained "during [a] war . . . [may] only be provided for by the treaty of peace" because "a treaty of peace abolishes the subject of the war . . . , [and a]ll violences, injuries or damages sustained by the government or people of either [belligerent] during the war, are buried in oblivion . . . by the very treaty of peace"); *see also Stewart v. Kahn*, 78 U.S. 493, 506-07 (1870) (states cannot interfere with federal war- and peace-making powers, which include the power to "remedy the evils which have arisen from [war's] rise and progress"). This principle is grounded, as the Ninth Circuit recognized, in the Constitution's textual

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(... continued)
No. 02-722, Pet. Reh. at 7 – wholly unlike section 354.6. *See also Garamendi*, 123 S. Ct. at 2397 (Ginsberg, J., dissenting) (noting that "statutory provisions enabling the litigation of Holocaust era insurance claims" were "not at issue" there).

commitment of war powers to the federal government, while withholding them from the states.[15]

The Ninth Circuit's conclusion that the "power to establish the procedure for resolving war claims" is "part of the inner core" of the "foreign relations power that is denied to the states," *Oh* Pet. App. at 20a-21a, seems to anticipate *Garamendi's* observation that "[v]indicating victims injured by acts and omissions of enemy corporations in wartime is . . . within the traditional subject matter of foreign policy in which the national, not state, interests are overriding." *Garamendi*, 123 S. Ct. at 2390. Thus California's attempt to provide its own war reparations law is surely subject to preemption under *Garamendi.*

**2. Field Preemption Is Particularly Appropriate Where, as Here, the Federal Government Has Exercised Its Treaty Powers**

Under the field preemption theory of the *Zschernig* majority opinion, state action may be preempted "*even absent any affirmative federal activity*" in the field. *Garamendi,* 123 S. Ct. at 2388; *see also Zschernig,* 389 U.S. at 441 (preemption found in the "*absence of* a treaty," statute or executive agreement). Here, unlike *Zschernig*, there has been intense federal activity in the very area of foreign affairs in which the California statute purports to operate. As the Ninth Circuit recognized, "the United States has *already exercised* its own exclusive authority to resolve the war, including claims arising out of it." *Oh* Pet. App. at 24a, 27a.

The fact that the United States' exercise of its foreign affairs authority culminated in the Treaty – as opposed to some other "affirmative federal activity" – provides additional support for finding preemption here. Whatever

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[15] *See also* The Federalist No. 3 ("[N]ot only fewer just causes of war will be given by the national government, but it will also be more in their power to accommodate *and settle them amicably*.").

may be said regarding executive agreements or other exercises of foreign affairs powers, the federal treaty power "enjoy[s] . . . textual detail" in the Constitution. *Garamendi*, 123 S. Ct. at 2386; *see* U.S. Const. art. II, § 2, cl. 2. Indeed, the power to make treaties is expressly *denied* to the states. *Id.* art. I, § 10, cl. 1. Furthermore, federal law embodied in a treaty reflects the consensus of Congress and the Executive regarding foreign policy. *Cf. Crosby*, 530 U.S. at 375 (noting that "'[w]hen the President acts [in foreign affairs] pursuant to an . . . authorization from Congress, his authority is at its maximum'") (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952)); *Garamendi*, 123 S. Ct. at 2400 n.4 (Ginsburg, J., dissenting) (criticizing the majority's reliance on *Crosby* because "*Crosby* was a *statutory* preemption case"). Here, both the Executive and Congress have acted to occupy the field of war reparations against Japan, through a longstanding policy embodied in the Treaty, leaving California no possible ambit to enact section 354.6.

### B. Particularly As Applied to Respondents, Section 354.6 Is Equally Preempted Under the "Conflict" Theory Described in *Garamendi*

Even if section 354.6 could somehow be viewed as addressing issues "within areas of . . . traditional state responsibility," so as to warrant application of the "conflict" preemption standard articulated in *Garamendi*, the California statute would still be preempted if applied to respondents. As articulated in *Garamendi,* the "clarity or substantiality" of a conflict "var[ies] with the strength or the traditional importance of the state concern asserted," *id.* at 2389 n.11, and, as appropriate, "the strength of the federal foreign policy interest." *Id.* Here, California's interest is extraordinarily weak, the conflict is acute, and the federal interest is overwhelming.

**1. The State's Interest Is Nonexistent**

California's interest in enacting section 354.6 is considerably weaker than it was even with respect to HVIRA, because here the statute possesses neither a state regulatory purpose nor any colorable claim to having been authorized by federal legislation. *Cf. Garamendi*, 123 S. Ct. at 2393 (discussing California's argument that Congress authorized laws like HVIRA in the McCarran-Ferguson Act and the U.S. Holocaust Assets Commission Act); *see also supra* n.14. Moreover, section 354.6 shares with HVIRA the fatal flaw that the conduct California seeks to govern – namely, conduct by Japan and Japanese nationals towards Korean and Chinese nationals in Asia during World War II – is wholly divorced from California. *Garamendi*, 123 S. Ct. at 2393 (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) and *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981)); *see infra* section II.A.

Even more attenuated than its interest in *enacting* section 354.6 is California's interest in having the statute *applied* in these cases. At best, California might have an interest in the welfare of Korean and Chinese nationals who moved to the state *after* World War II, but *Garamendi* explicitly held that this factor should be accorded "'little or no significance.'" *Id.* (quoting *Shutts*, 472 U.S. at 820). Furthermore, as a matter of fact, only a few of the hundreds of thousands of putative class members in these cases have claimed California residency. ER 3 (*Kim* Complaint); ER 68 (*Sung* Complaint). Thus *no* cognizable state interest is at stake in these cases.

**2. The Conflict with the Allied Treaty**

Given the lack of state interest, only a minimal conflict is required for "conflict" preemption to exist under *Garamendi*. *Id.* at 2389 (strength of state interest determines "how serious a conflict must be shown before declaring the state

law preempted"). In this case, though, the conflict is clear and direct.

"The Treaty reflects the United States government's foreign policy determination that all war-related claims against Japan and its nationals – including private claims and including the claims of those whose governments were not party to the Treaty – should be resolved by *government-to-government agreement rather than litigation.*" App. F at 42a-43a, 49a, 54a.[16] This approach is in harmony with well-settled international and U.S. legal principles. *See, e.g.*, *Ware*, 3 U.S. at 229 (Chase, J.).

With respect to Korea, U.S. law and policy is codified in article 4(a) of the Treaty, which commits the Korean petitioners' claims to resolution through "special arrangements" between Japan and Korea and leaves no room for any other U.S. law remedy. App. A at 3a. Article 26 of the Treaty obligated Japan to conclude separate treaties with China as well as Korea "on the same or substantially the same terms" as the Allied Treaty, including the latter's claims resolution provisions. App. A at 19a-20a. Private lawsuits in U.S. courts under California (or even federal) law are, of course, the antithesis of the diplomatic resolution mandated by the Treaty. *See* App. F at 53a-55a ("The Treaty of Peace . . . provides that the claims of Korea and China, and those of their nationals, will be resolved through inter-governmental agreements rather than through litigation."). Japan shares this view. SER 525 (Japan's *Note Verbale*) ("[T]hese issues should not be adjudicated in the courts in the United States."). Allowing claims to proceed in U.S. courts would therefore "undermine[] the intended purpose and 'natural effect'" of the Treaty. *See Crosby*, 530 U.S. at

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[16] "[T]he meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982).

373 (finding conflict preemption); App. F at 49a-50a (noting the "conflict[]" between section 354.6 and the Treaty), 55a (stating that Korean and Chinese plaintiffs "may not, consistent with the United States' policy adopted in the Treaty, pursue their claims in the courts of the United States.").

Very recently, a unanimous panel of the U.S. Court of Appeals for the District of Columbia Circuit found that the Treaty foreclosed war-related claims by Korean and Chinese nationals in U.S. courts. In *Joo v. Japan*, 332 F.3d 679 (D.C. Cir. 2003), the court considered whether the commercial exception to the Foreign Sovereign Immunities Act could be applied retroactively to World War II events; the court concluded that it could not, in part because "the [Allied] Treaty manifests the parties' intent to resolve matters arising from World War II *without involving the courts of the United States* (or of any signatory nation)." *Id.* at 684-85. The court found that the Treaty "expressed a clear [U.S.] policy of resolving the claims of Korean and Chinese nationals through government-to-government negotiation." *Id.* at 685.[17] Indeed, as evidence of such subsequent negotiations, the *Joo* court cited the Japan-Korea Treaty and the Japan-ROC Treaty. *Id.*; *see also* App. B and App. C.

The certiorari petitions never mention the Treaty provisions directed to resolution of war claims among Japan, Korea and China, confining their treatment of the Treaty to stating that Korea and China were not signatories. The issue, however, is not whether Korea or China were signatories; it is that the Treaty "establish[es] the law of *the United States*

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[17] The court pointed to article 14 of the Treaty, which reciprocally waived all claims of Allied and Japanese nationals, and noted that "it would be odd indeed for the United States, on the one hand, to waive all claims of its nationals against Japan and, on the other hand, to allow non-[signatory] nationals to proceed against Japan in its courts." *Joo*, 332 F.3d at 685.

with respect to the war-related claims of Korean and Chinese nationals." App. F at 54a. That law – mandating resolution through diplomacy – binds U.S. courts, including state courts and state legislatures; no other or additional remedy can be supplied under United States law.

One result of the diplomacy mandated by the Treaty was the Japan-Korea Treaty, which is "part and parcel of the framework created by the United States in 1951." SER 512 (U.S. Statement of Interest). That treaty *independently* precludes adjudication of petitioners' claims, for through it Japan paid Korea a half billion dollars in grants and loans, App. B at 21a-22a (art. I), and the parties "*settled completely and finally*" the "problem concerning property, rights and interests of the two Contracting Parties *and their nationals*" as well as "claims between the Contracting Parties *and their nationals*" (including juridical persons), App. B at 23a (art. II, ¶ 1). The claims resolved "include[d]" – but are not restricted to – "those provided for in" article 4 of the Allied Treaty – *i.e.,* reparations – and "claims that . . . Korean natural persons have against . . . *Japanese nationals* such as . . . *claims by Koreans against Japanese . . . corporations*." SER 370 (Agreed Minutes ¶ 2(g)); SER 320-22 (Republic of Korea, White Paper on Korea-Japan Talks (1965)); SER 346-47 (Outline of the "Eight Items" – Claims Made by Korea Against Japan).

Other products of the Treaty are the Japan-ROC and Japan-PRC treaties and the Joint Communiqué, which, separately and together, reciprocally settled all war claims of Japanese and Chinese nationals. In negotiating and signing these treaties, Japan complied not only with its obligations under the Allied Treaty, but with the admonition of the United States that Japan "pursue foreign policies in Asia which were generally compatible with those of the United States, particularly in relation to China." SER 376-77. The Japan-ROC Treaty literally incorporated by reference the "relevant provisions" of the Allied Treaty as the rule by

which "any problem" between the signatories resulting from "the existence of a state of war" "*shall be settled*" (unless the Japan-ROC Treaty, or its supplementary documents, provided otherwise). App. C at 29a (art. XI). Having concluded a treaty with the only government of China recognized by the United States – the ROC – Japan reasonably took the position that its treaty with the ROC resolved all war claims involving China. Nevertheless, in 1972, Japan responded to the United States' recognition of the PRC by opening negotiations to "normalize" its own relations with the PRC, SER 409-410, an "opening to China" that led to the Joint Communiqué in which Japan and the PRC agreed to language, carefully drafted as a political compromise to preserve the dignity of both sides, whereby the PRC declared "that in the interest of the friendship between the Chinese and the Japanese peoples," the PRC "*renounces its demand for war reparation from Japan.*" App. D at 33a (art. 5). The Japan-PRC Treaty, App. E, incorporated and reaffirmed the terms of the Joint Communiqué. Thus the fruit of the Allied Treaty's resolution of petitioners' claims via diplomacy resulted in other, nonjudicial resolutions of those claims under the laws of petitioners' own countries.[18]

### 3. The Overwhelming Federal Foreign Policy Interest

The resolution of World War II-era reparations claims against Japanese companies is an "area of uniquely federal interest" for all of the reasons discussed above with respect to the appropriateness of a "field" preemption analysis. *Garamendi,* 123 S. Ct. at 2389 n.11; *Boyle v. United Techs.*

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[18] As noted above, however, petitioners would be unable to proceed in U.S. courts even if the agreements between Japan and Korea and Japan and China permitted lawsuits. U.S. courts are bound by "the law of the United States," which mandates a nonjudicial resolution of "the war-related claims of Korean and Chinese nationals." App. F. at 54a.

*Corp.*, 487 U.S. 500, 507-08 (1987). The Ninth Circuit carefully and correctly assessed this overwhelming federal interest, which provides a further reason that the balance of factors leads inexorably to preemption in these cases, even under a "conflict" theory analysis.

### C. *Garamendi* Expressly Rejected Many of Petitioners' Specific Attacks on the Decision Below

In addition to validating the Ninth Circuit's foreign affairs preemption analysis, *Garamendi* addressed and rejected several of petitioners' arguments based on their (incorrect) assumption that *Low* was decided correctly. Both petitions insist that foreign affairs preemption does not apply to suits against "private" parties. *Oh* Pet. at 2, 16, 18, 20; *Ma* Pet. at 18 and 21. *Garamendi*, however, flatly rejected any "distinction" between companies and governments of "formerly belligerent states." 123 S. Ct. at 2387. Observing that "untangling government policy from private initiative during war time is often so hard that diplomatic action settling claims against private parties may well be just as essential in the aftermath of hostilities as diplomacy to settle claims against foreign governments," this Court found that the attempted distinction simply "does not matter". *Id.* What was true in *Garamendi* is doubly so here, where petitioners have *alleged* that the *Japanese government* ordered their forced labor. *See, e.g.*, ER 34 (*Choe* complaint); ER 97, 98-99 (*Sin* complaint); ER 123-24 (*Oh* complaint). Indeed, as the Ninth Circuit recognized, the only suits permitted by section 354.6 are against "'enterprises'" that, "if not themselves our wartime enemies, were operating in enemy territory and presumably – no party disputes this – with the consent and for the benefit of our wartime enemy." *Oh* Pet. App. at 23a (quoting § 354.6(a)(1), (2)).

The *Oh* petitioners also make the odd argument that section 354.6 is not subject to preemption because it does "not focus on any single country." *Oh* Pet. at 17. Not only

is their premise wrong – the statute focuses solely on conduct of the "Nazi regime, its allies and sympathizers," while ignoring forced labor practices of other countries or eras, § 354.6(a)(1), (2) – but also the reach of HVIRA was even broader. As the *Oh* petitioners concede, HVIRA did not "target any particular country," *Oh* Pet. at 14-15, yet its wider scope posed no obstacle to the application of foreign affairs preemption in *Garamendi*.

Petitioners also incorrectly characterize section 354.6 as purely a statute of limitations, implying that it cannot therefore interfere with foreign affairs. *Oh* Pet. at 2, 6-7; *Ma* Pet. at 22-25. Once again, the premise is wrong. As the Ninth Circuit found, and as discussed in section II.A.3. *infra*, section 354.6 is *not* merely a limitations statute. But, even if it were, petitioners cite no authority differentiating between limitations and substantive statutes in a foreign affairs analysis, and, as the Ninth Circuit recognized, neither logic nor policy permits such a distinction. *See Oh* Pet. App. at 14a ("Whether substantive or procedural," section 354.6 creates a "new rule [that] profoundly alters the likelihood that" Second World War reparations "actions will succeed.").

Just as misguided is petitioners' argument that section 354.6 does not "implicate *current* foreign policy." *Oh* Pet. at 16, 21; *Ma* Pet. at 21. The Allied Treaty, although signed some 50 years ago, is current law in the United States and Japan. As the United States advised the lower courts, it remains the cornerstone of U.S. foreign policy in the Far East and is as much an expression of U.S. and Japanese foreign policy today as it was in 1951. SER 505 (U.S. Statement of Interest). Section 354.6 therefore *does* affect ongoing foreign relations – indeed, the United States and Japan agree that the law threatens to "jeopardiz[e] relations between the United States and Japan and Japan and its Asian neighbors." SER 520 (U.S. Statement of Interest); *see* SER 525 (*Note Verbale*).

Petitioners' contention that the Ninth Circuit applied a "rigid rule" so broad that it would preclude numerous suits that other courts have allowed to go forward, *Oh* Pet. at 22-28; *Ma* Pet. at 19-22, misrepresents both the Ninth Circuit's decision and the suits that other courts have entertained. Contrary to petitioners' assertions that the Ninth Circuit's holding precludes any state cause of action "*somehow relate[d] to war*," *Oh* Pet. at i, *see also Oh* Pet. at 25-27, that arose "before or during a time of war" *see, e.g.*, *Ma* Pet. at i, *see also Ma* Pet. at 12, 14, 18-19 and 21, the decision contains neither words nor reasoning that remotely could yield such a result.

The Ninth Circuit's holding, in fact, is narrow: "section 354.6 is impermissible because it intrudes on the federal government's exclusive power to *make and resolve war, including the procedure for resolving war claims*." *Oh* Pet. App. at 23a. This holding is further limited by the court's explicit reliance on the fact that the federal government "has *already exercised*" its authority to resolve the war it waged. *Oh* Pet. App. at 24a. Of the cases that petitioners allege are in conflict with the Ninth Circuit's opinion, none involves the core federal power to resolve, through a treaty or otherwise, a war waged by the United States or a state-created cause of action devoted to war reparations. Thus there is *no* contradiction between the Ninth Circuit's holding and the cases petitioners cite. *Oh* Pet. at 25-27; *Ma* Pet. at 20-21.

## II. Alternative Grounds for Dismissal Make Grant of Certiorari Inappropriate

Preemption is only one of many grounds for dismissing petitioners' claims. Respondents briefly bring a few of these to the Court's attention both to inform the decision on the petitions and to request that, should review on the issue of foreign affairs preemption be granted, these grounds also be considered as a basis for affirmance.

### A. Applying California Law Would Violate Due Process

One of the issues on which certiorari was granted in *Garamendi* was whether HVIRA exceeded California's "legislative jurisdiction" under the Due Process Clause, given the tenuous connection between California and the issuance of insurance policies in Europe decades ago. *Garamendi*, 123 S. Ct. at 2385 n.7. While the Court did not reach the issue in *Garamendi, id.*, in this case there can be no doubt that the Due Process Clause forbids California to apply its law to the conduct of Japan and Japanese nationals toward Koreans and Chinese in Asia during World War II.

#### 1. Due Process Requires Significant Contacts Between California and the Conduct It Regulates

As *Garamendi* explained, "the general standards for evaluating a State's claim to apply its forum law to a particular controversy or transaction" may be found in this Court's opinions in *Shutts* and *Allstate*. 123 S. Ct. at 2393. Those standards make it unconstitutional to apply the law of a "State [that] has only an insignificant contact with the parties *and the occurrence or transaction.*" *Allstate*, 449 U.S. at 310-11 (plurality); *id.* at 333 (Powell, J., dissenting); *see also Shutts*, 472 U.S. at 822 (state "may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them"). In *Shutts*, for example, this Court held that Kansas law could not constitutionally govern claims of non-Kansas petitioners against a non-Kansas respondent regarding non-Kansas leases, even though respondent "own[ed] property and conduct[ed] substantial business in the State" and "hundreds of Kansas plaintiffs were [also] affected" by the challenged conduct. *Id.*, 472 U.S. at 818-22.

A state may apply its law only if it has "'a *significant contact or significant aggregation of contacts*, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.'" *Shutts*, 472 U.S. at 818 (quoting

*Allstate*, 449 U.S. at 312-13); *accord Franchise Tax Bd. v. Hyatt*, 123 S. Ct. 1683, 1687 (2003). In determining whether "application of [forum law is] sufficiently arbitrary and unfair as to exceed constitutional limits," the "expectation of the parties [is] an important element." *Shutts*, 472 U.S. at 822.

Here, the conduct at issue is wholly unconnected to California. *None* of the petitioners had any relationship with California at the time of the alleged conduct, and almost none does even now. Neither petitioners nor respondents, at the time of the events, could "reasonably have anticipated that their actions would later be judged" by California law. *Allstate*, 449 U.S. at 327 (Stevens, J., concurring). Thus section 354.6, as applied, exceeds California's legislative jurisdiction.

### 2. The Presence Today of Some Petitioners and Respondents in California Does Not Satisfy Due Process

Nor is the absence of any "significant contact" between California and these cases cured because a few petitioners may have become California residents in the sixty years since their claims arose. "'Even if a plaintiff evidences his desire for forum law by moving to the forum,'" this Court has "'generally accorded such a move little or no significance.'" *Garamendi*, 123 S. Ct. at 2393 (quoting *Shutts*, 472 U.S. 820); *see also Allstate*, 449 U.S. at 319 (plurality) ("[A] postoccurrence change of residence to the forum State [is] insufficient" in and of itself to confer power on the forum State to choose its law.) *cited in Garamendi*, 123 S. Ct. at 2393.

No more pertinent is the amenability of some respondents to personal jurisdiction in California.[19] "[W]hile a State

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[19] Petitioners assert claims under section 354.6 against U.S. subsidiaries that came into being long after World War II, and therefore (continued ...)

may . . . assume jurisdiction over the claims of [parties] whose principal contacts are with other States, it *may not use this assumption of jurisdiction as an added weight in the scale when considering the permissible constitutional limits on choice of substantive law.*" *Shutts*, 472 U.S. at 819, 821.

### 3. Calling the Statute "Procedural" Does Not Cure the Due Process Violation

Both petitioners and the California Attorney General admitted in the District Court that section 354.6 is not just a statute of limitations that extends the time within which claims under existing law can be filed, but creates a new cause of action – which petitioners in fact sued upon – and without which, they also admit by their arguments in this Court, they would have no claim at all. Plaintiffs' Supplemental Brief Regarding the Constitutionality of Code of Civil Procedure Section 354.6, filed Mar. 1, 2001, at 2, 3; *Amicus Curiae* Brief of the Attorney General of the State of California, filed Aug. 8, 2000, at 4. Now, however, these parties, hoping to evade the rule of *Shutts*, have altered their position, contending that the statute is only a "procedural" statute of limitations. *See, e.g., Oh* Pet. at 2, 6-7; *Ma* Pet. at 22-25.

Even if these parties were free to change position – and they were not, *see, e.g., Helfand v. Gerson,* 105 F.3d 530, 535-36 (9th Cir. 1996) – their revised argument is both wrong and irrelevant. It is wrong because, as the Ninth Circuit observed, the statute "explicitly creates a cause of action by providing that certain individuals 'may bring an

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(... continued)
had no involvement whatsoever in any of the alleged forced labor. The further due process violation that would result from applying the statute to such entities provides yet another basis for affirming the court of appeals. *See Gerling Global Reins. Corp.* v. *Nelson*, 123 F. Supp. 2d 1298, 1302 (N.D. Fla. 2000), *aff'd, Gerling Global Reins. Corp. of Am.* v. *Gallagher*, 267 F.3d 1228 (11th Cir. 2001).

action' for certain wrongs." *Oh* Pet. App. at 12a (quoting § 354.6(b) and citing *Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 644 (2002) (statute providing party "may bring an action" "reads like the conferral of a private right of action")). Further, the limitations period of section 354.6(c) applies only to "action[s] *brought* under *this section*," *i.e.*, actions maintained under section 354.6 itself.[20] Thus it cannot be just a statute of limitations, for it would not have any claim to limit. Petitioners' assertion of claims directly based on section 354.6 also confirms its substantive nature. ER 24 (*Kim)*; ER 56 (*Choe*); ER 80 (*Sung*); ER 103 (*Sin*); ER 126 (*Oh*); ER 153 (*Su*); ER 254 (*Ma*).

The argument is irrelevant because, even if section 354.6 *were* merely a statute of limitations that revived other California claims, subjecting respondents to liability for those claims would itself violate due process, for the reasons discussed in part, II.A.1. *supra*. It would also run afoul of the constitutional prohibition on retroactive legislation. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994); *cf. Stogner v. California,* 123 S. Ct. 2446 (2003) (a law enacted after expiration of a previously applicable limitations period violates the Ex Post Facto Clause when applied to revive a previously time-barred criminal prosecution). The Ninth Circuit, although not deciding the retroactivity issue, recognized that "[s]uch a revival of liability – even civil

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[20] The *Ma* petition alludes to a supposed conflict between the Ninth Circuit's decision and the California Court of Appeal decision in *Taiheiyo Cement Co. v. Superior Court (Jeong)* on the issue of whether section 354.6 creates a cause of action. *See Ma* Pet. at 1, 15-16 (arguing that the "embarrassing conflict" between *Taiheiyo* and *Deutsch* adds "some urgency to the need for this Court's review"). As petitioners acknowledge, however (*id.* at 1), the decision in *Taiheiyo* has been superseded by the California Supreme Court's grant of review. *See Taiheiyo Cement Co. v. Superior Court (Jeong)*, 66 P.3d 1231 (Cal. 2003), and Cal. Rule of Court 976(c).

liability – is troubling and raises serious due process questions." *Oh* Pet. App. at 14a.

### B. Petitioners' Claims Are Precluded by Japan's Treaties with Korea and China

As discussed briefly *supra* pp. 21-22, the bilateral treaties Japan entered into with Korea and China, in obedience to the Allied Treaty and consistent with U.S. foreign policy, all contain provisions effectively settling and barring all war-related claims of Korean and Chinese nationals. The Japan-Korea Treaty's waiver of claims provision has also been implemented through domestic legislation in both countries. SER 30, 45-71 (Declaration of Akira Kotera, Professor of International Law at the University of Tokyo); SER 76-77 (Declaration of Yuji Iwasawa, Professor of International Law at the University of Tokyo).

### C. Petitioners' Claims Are Nonjusticiable

As discussed briefly above, the negotiations culminating in the Allied Treaty accommodated diverse policies and interests of both signatory and nonsignatory states, including Korea and China. Petitioners ask this Court to set aside these policies and political compromises, the fruits of which remain the cornerstone of U.S. foreign policy in Asia, and to put the courts of California in the business of deciding war claims – an inherently political, nonjudicial realm. This course is foreclosed by the political question doctrine.

*Baker v. Carr*, 369 U.S. 186, 210-11 (1962) identified six indicia of nonjusticiable, political questions; if even *one* is present, a case must be dismissed. 369 U.S. at 217. All six *Baker* indicia are present here. Matters of war and peace, including resolution of war claims, are foreign affairs issues "constitutionally committed" to the political branches, and the actions of those branches in negotiating and adopting the Treaty framework required numerous "policy determination[s]" that are entitled to "respect" and

"unquestioning adherence." *See id.* Not only would it create a "potentiality of embarrassment from multifarious pronouncements" for a court to revisit these long-resolved political issues – as the United States urged below – courts simply lack the ability to perform the type of political calculus involved in resolving war claims. *See id.* The Treaty framework consists of "reparations agreements which the United States and other World War II combatants (whose blood and treasure brought the war of conquest . . . to an end) forged in the crucible of a devastated post-war [world] and in the crucible of the Cold War" – agreements "which the court does not have the judicial power" to refashion, even had they the necessary wisdom. *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 282 (D.N.J. 1999).

**Conclusion**

The Court should deny the petitions outright. The foreign affairs analysis of the decision below accords with, and the judgment is compelled by, *Garamendi.* Should this Court nevertheless choose to consider the foreign affairs doctrine issues raised by petitioners, it should also certify for review respondents' alternative grounds for dismissal of the complaints.

Respectfully submitted,

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Dated: August 4, 2003

# APPENDICES

*Appendix A*

## TREATY OF PEACE WITH JAPAN
**Sept. 8, 1951**
**San Francisco, California**

Whereas the Allied Powers and Japan are resolved that henceforth their relations shall be those of nations which, as sovereign equals, cooperate in friendly association to promote their common welfare and to maintain international peace and security, and are therefore desirous of concluding a Treaty of Peace which will settle questions still outstanding as a result of the existence of a state of war between them;

Whereas Japan for its part declares its intention to apply for membership in the United Nations and in all circumstances to conform to the principles of the Charter of the United Nations; to strive to realize the objectives of the Universal Declaration of Human Rights; to seek to create within Japan conditions of stability and well-being as defined in Articles 55 and 56 of the Charter of the United Nations and already initiated by post-surrender Japanese legislation; and in public and private trade and commerce to conform to internationally accepted fair practices;

Whereas the Allied Powers welcome the intentions of Japan set out in the foregoing paragraph;

The Allied Powers and Japan have therefore determined to conclude the present Treaty of Peace, and have accordingly appointed the undersigned Plenipotentiaries, who, after presentation of their full powers, found in good and due form, have agreed on the following provisions:

*Appendix A*

## CHAPTER I

## PEACE

### Article 1

(a) The state of war between Japan and each of the Allied Powers is terminated as from the date on which the present Treaty comes into force between Japan and the Allied Power concerned as provided for in Article 23.

(b) The Allied Powers recognize the full sovereignty of the Japanese people over Japan and its territorial waters.

## CHAPTER II

## TERRITORY

### Article 2

(a) Japan recognizing the independence of Korea, renounces all right, title and claim to Korea, including the islands of Quelpart, Port Hamilton and Dagelet.

(b) Japan renounces all right, title and claim to Formosa and the Pescadores.

(c) Japan renounces all right, title and claim to the Kurile Islands, and to that portion of Sakhalin and the islands adjacent to it over which Japan acquired sovereignty as a consequence of the Treaty of Portsmouth of September 5, 1905.

(d) Japan renounces all right, title and claim in connection with the League of Nations Mandate System, and accepts the action of the United Nations Security Council of April 2, 1947, extending the trusteeship system to the Pacific Islands formerly under mandate to Japan.

*Appendix A*

(e) Japan renounces all claim to any right or title to or interest in connection with any part of the Antarctic area, whether deriving from the activities of Japanese nationals or otherwise.

(f) Japan renounces all right, title and claim to the Spratly Islands and to the Paracel Islands.

Article 3

Japan will concur in any proposal of the United States to the United Nations to place under its trusteeship system, with the United States as the sole administering authority, Nansei Shoto south of 29° north latitude (including the Ryukyu Islands and the Daito Islands), Nanpo Shoto south of Sofu Gan (including the Bonin Islands, Rosario Island and the Volcano Islands) and Parece Vela and Marcus Island. Pending the making of such a proposal and affirmative action thereon, the United States will have the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of these islands, including their territorial waters.

Article 4

(a) Subject to the provisions of paragraph (b) of this Article, the disposition of property of Japan and of its nationals in the areas referred to in Article 2, and their claims, including debts, against the authorities presently administering such areas and the residents (including juridical persons) thereof, and the disposition in Japan of property of such authorities and residents, and of claims, including debts, of such authorities and residents against Japan and its nationals, shall be the subject of special arrangements between Japan and such authorities. The property of any of the Allied Powers or its nationals in the areas referred to in Article 2 shall, insofar as this has not already been done, be returned by the administering authority in the condition in which it now exists. (The term nationals whenever used in the present Treaty includes juridical persons.)

(b) Japan recognizes the validity of dispositions of property of Japan and Japanese nationals made by or pursuant to directives of the United States Military Government in any of the areas referred to in Articles 2 and 3.

(c) Japanese owned submarine cables connecting Japan with territory removed from Japanese control pursuant to the present Treaty shall be equally divided, Japan retaining the Japanese terminal and adjoining half of the cable, and the detached territory the remainder of the cable and connecting terminal facilities.

## CHAPTER III

## SECURITY

### Article 5

(a) Japan accepts the obligations set forth in Article 2 of the Charter of the United Nations, and in particular the obligations

(i) to settle its international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered;

(ii) to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the Purposes of the United Nations;

(iii) to give the United Nations every assistance in any action it takes in accordance with the Charter and to refrain from giving assistance to any State against which the United Nations may take preventive or enforcement action.

(b) The Allied Powers confirm that they will be guided by the principles of Article 2 of the Charter of the United Nations in their relations with Japan.

(c) The Allied Powers for their part recognize that Japan as a sovereign nation possesses the inherent right of individual or collective self-defense referred to in Article 51 of the Charter of the United Nations and that Japan may voluntarily enter into collective security arrangements.

Article 6

(a) All occupation forces of the Allied Powers shall be withdrawn from Japan as soon as possible after the coming into force of the present Treaty, and in any case not later than 90 days thereafter. Nothing in this provision shall, however, prevent the stationing or retention of foreign armed forces in Japanese territory under or in consequence of any bilateral or multilateral agreements which have been or may be made between one or more of the Allied Powers, on the one hand, and Japan on the other.

(b) The provisions of Article 9 of the Potsdam Proclamation of 26 July 1945, dealing with the return of Japanese military forces to their homes, to the extent not already completed, will be carried out.

(c) All Japanese property for which compensation has not already been paid, which was supplied for the use of the occupation forces and which remains in the possession of those forces at the time of the coming into force of the present Treaty, shall be returned to the Japanese Government within the same 90 days unless other arrangements are made by mutual agreement.

CHAPTER IV

POLITICAL AND ECONOMIC CLAUSES

Article 7

(a) Each of the Allied Powers, within one year after the present Treaty has come into force between it and Japan, will notify

*Appendix A*

Japan which of its prewar bilateral treaties or conventions with Japan it wishes to continue in force or revive, and any treaties or conventions so notified shall continue in force or by revived subject only to such amendments as may be necessary to ensure conformity with the present Treaty. The treaties and conventions so notified shall be considered as having been continued in force or revived three months after the date of notification and shall be registered with the Secretariat of the United Nations. All such treaties and conventions as to which Japan is not so notified shall be regarded as abrogated.

(b) Any notification made under paragraph (a) of this Article may except from the operation or revival of a treaty or convention any territory for the international relations of which the notifying Power is responsible, until three months after the date on which notice is given to Japan that such exception shall cease to apply.

Article 8

(a) Japan will recognize the full force of all treaties now or hereafter concluded by the Allied Powers for terminating the state of war initiated on September 1, 1939, as well as any other arrangements by the Allied Powers for or in connection with the restoration of peace. Japan also accepts the arrangements made for terminating the former League of Nations and Permanent Court of International Justice.

(b) Japan renounces all such rights and interests as it may derive from being a signatory power of the Conventions of St. Germain-en-Laye of September 10, 1919, and the Straits Agreement of Montreux of July 20, 1936, and from Article 16 of the Treaty of Peace with Turkey signed at Lausanne on July 24, 1923.

(c) Japan renounces all rights, title and interests acquired under, and is discharged from all obligations resulting from, the Agreement between Germany and the Creditor Powers of

*Appendix A*

January 20, 1930 and its Annexes, including the Trust Agreement, dated 17 May 1930, the Convention of January 20, 1930, respecting the Bank for International Settlements; and the Statutes of the Bank for International Settlements. Japan will notify to the Ministry of Foreign Affairs in Paris within six months of the first coming into force of the present Treaty its renunciation of the rights, title and interests referred to in this paragraph.

Article 9

Japan will enter promptly into negotiations with the Allied Powers so desiring for the conclusion of bilateral and multilateral agreements providing for the regulation or limitation of fishing and the conservation and development of fisheries on the high seas.

Article 10

Japan renounces all special rights and interests in China, including all benefits and privileges resulting from the provisions of the final Protocol signed at Peking on September 7, 1901, and all annexes, notes and documents supplementary thereto, and agrees to the abrogation in respect to Japan of the said protocol, annexes, notes and documents.

Article 11

Japan accepts the judgments of the International Military Tribunal for the Far East and of other Allied War Crimes Courts both within and outside Japan, and will carry out the sentences imposed thereby upon Japanese nationals imprisoned in Japan. The power to grant clemency, to reduce sentences and to parole with respect to such prisoners may not be exercised except on the decision of the Government or Governments which imposed the sentence in each instance, and on recommendation of Japan. In the case of persons sentenced by the International Military Tribunal for the Far East, such power may not be exercised

except on the decision of a majority of the Governments represented on the Tribunal, and on the recommendation of Japan.

Article 12

(a) Japan declares its readiness promptly to enter into negotiations for the conclusion with each of the Allied Powers of treaties or agreements to place their trading, maritime and other commercial relations on a stable and friendly basis.

(b) Pending the conclusion of the relevant treaty or agreement, Japan will, during a period of four years from the first coming into force of the present Treaty

(1) accord to each of the Allied Powers, its nationals, products and vessels

(i) most-favored-nation treatment with respect to customs duties, charges, restrictions and other regulations on or in connection with the importation and exportation of goods;

(ii) national treatment with respect to shipping, navigation and imported goods, and with respect to natural and juridical persons and their interests - such treatment to include all matters pertaining to the levying and collection of taxes, access to the courts, the making and performance of contracts, rights to property (tangible and intangible), participating in juridical entities constituted under Japanese law, and generally the conduct of all kinds of business and professional activities;

(2) ensure that external purchases and sales of Japanese state trading enterprises shall be based solely on commercial considerations.

(c) In respect to any matter, however, Japan shall be obliged to accord to an Allied Power national treatment, or most-favored-nation treatment, only to the extent that the Allied Power concerned accords Japan national treatment or most-favored-

nation treatment, as the case may be, in respect of the same matter. The reciprocity envisaged in the foregoing sentence shall be determined, in the case of products, vessels and juridical entities of, and persons domiciled in, any non-metropolitan territory of an Allied Power, and in the case of juridical entities of, and persons domiciled in, any state or province of an Allied Power having a federal government, by reference to the treatment accorded to Japan in such territory, state or province.

(d) In the application of this Article, a discriminatory measure shall not be considered to derogate from the grant of national or most-favored-nation treatment, as the case may be, if such measure is based on an exception customarily provided for in the commercial treaties of the party applying it, or on the need to safeguard that party's external financial position or balance of payments (except in respect to shipping and navigation), or on the need to maintain its essential security interests, and provided such measure is proportionate to the circumstances and not applied in an arbitrary or unreasonable manner.

(e) Japan's obligations under this Article shall not be affected by the exercise of any Allied rights under Article 14 of the present Treaty; nor shall the provisions of this Article be understood as limiting the undertakings assumed by Japan by virtue of Article 15 of the Treaty.

Article 13

(a) Japan will enter into negotiations with any of the Allied Powers, promptly upon the request of such Power or Powers, for the conclusion of bilateral or multilateral agreements relating to international civil air transport.

(b) Pending the conclusion of such agreement or agreements, Japan will, during a period of four years from the first coming into force of the present Treaty, extend to such Power treatment not less favorable with respect to air-traffic rights and privileges

than those exercised by any such Powers at the date of such coming into force, and will accord complete equality of opportunity in respect to the operation and development of air services.

(c) Pending its becoming a party to the Convention on International Civil Aviation in accordance with Article 93 thereof, Japan will give effect to the provisions of that Convention applicable to the international navigation of aircraft, and will give effect to the standards, practices and procedures adopted as annexes to the Convention in accordance with the terms of the Convention.

## CHAPTER V

## CLAIMS AND PROPERTY

### Article 14

(a) It is recognized that Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war. Nevertheless it is also recognized that the resources of Japan are not presently sufficient, if it is to maintain a viable economy, to make complete reparation for all such damage and suffering and at the same time meet its other obligations.

Therefore,

1. Japan will promptly enter into negotiations with Allied Powers so desiring, whose present territories were occupied by Japanese forces and damaged by Japan, with a view to assisting to compensate those countries for the cost of repairing the damage done, by making available the services of the Japanese people in production, salvaging and other work for the Allied Powers in question. Such arrangements shall avoid the imposition of additional liabilities on other Allied Powers, and, where the manufacturing of raw materials is called for, they

shall be supplied by the Allied Powers in question, so as not to throw any foreign exchange burden upon Japan.

2. (I) Subject to the provisions of subparagraph (II) below, each of the Allied Powers shall have the right to seize, retain, liquidate or otherwise dispose of all property, rights and interests of

(a) Japan and Japanese nationals,

(b) persons acting for or on behalf of Japan or Japanese nationals, and

(c) entities owned or controlled by Japan or Japanese nationals, which on the first coming into force of the present Treaty were subject to its jurisdiction. The property, rights and interests specified in this subparagraph shall include those now blocked, vested or in the possession or under the control of enemy property authorities of Allied Powers, which belong to, or were held or managed on behalf of, any of the persons or entities mentioned in (a), (b) or (c) above at the time such assets came under the controls of such authorities.

(II) The following shall be excepted from the right specified in subparagraph (I) above:

(i) property of Japanese natural persons who during the war resided with the permission of the Government concerned in the territory of one of the Allied Powers, other than territory occupied by Japan, except property subjected to restrictions during the war and not released from such restrictions as of the date of the first coming into force of the present Treaty;

(ii) all real property, furniture and fixtures owned by the Government of Japan and used for diplomatic or consular purposes, and all personal furniture and furnishings and other private property not of an investment nature which was normally necessary for the carrying out of diplomatic and

consular functions, owned by Japanese diplomatic and consular personnel;

(iii) property belonging to religious bodies or private charitable institutions and used exclusively for religious or charitable purposes;

(iv) property, rights and interests which have come within its jurisdiction in consequence of the resumption of trade and financial relations subsequent to September 2, 1945, between the country concerned and Japan, except such as have resulted from transactions contrary to the laws of the Allied Power concerned;

(v) obligations of Japan or Japanese nationals, any right, title or interest in tangible property located in Japan, interests in enterprises organized under the laws of Japan, or any paper evidence thereof; provided that this exception shall only apply to obligations of Japan and its nationals expressed in Japanese currency.

(III) Property referred to in exceptions (i) through (v) above shall be returned subject to reasonable expenses for its preservation and administration. If any such property has been liquidated the proceeds shall be returned instead.

(IV) The right to seize, retain, liquidate or otherwise dispose of property as provided in subparagraph (I) above shall be exercised in accordance with the laws of the Allied Power concerned, and the owner shall have only such rights as may be given him by those laws.

(V) The Allied Powers agree to deal with Japanese trademarks and literary and artistic property rights on a basis as favorable to Japan as circumstances ruling in each country will permit.

(b) Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers,

other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.

Article 15

(a) Upon application made within nine months of the coming into force of the present Treaty between Japan and the Allied Power concerned, Japan will, within six months of the date of such application, return the property, tangible and intangible, and all rights or interests of any kind in Japan of each Allied Power and its nationals which was within Japan at any time between December 7, 1941 and September 2, 1945, unless the owner has freely disposed thereof without duress or fraud. Such property shall be returned free of all encumbrances and charges to which it may have become subject because of the war, and without any charges for its return. Property whose return is not applied for by or on behalf of the owner or by his Government within the prescribed period may be disposed of by the Japanese Government as it may determine. In cases where such property was within Japan on December 7, 1941, and cannot be returned or has suffered injury or damage as a result of the war, compensation will be made on terms not less favorable than the terms provided in the draft Allied Powers Property Compensation Law approved by the Japanese Cabinet on July 13, 1951.

(b) With respect to industrial property rights impaired during the war, Japan will continue to accord to the Allied Powers and their nationals benefits no less than those heretofore accorded by Cabinet Orders No. 309 effective September 1, 1949, No. 12 effective January 28, 1950, and No. 9 effective February 1, 1950, all as now amended, provided such nationals have applied for such benefits within the time limits prescribed therein.

(c) (i) Japan acknowledges that the literary and artistic property rights which existed in Japan on December 7, 1941, in respect

to the published and unpublished works of the Allied Powers and their nationals have continued in force since that date, and recognizes those rights which have arisen, or but for the war would have arisen, in Japan since that date, by the operation of any conventions and agreements to which Japan was a party on that date, irrespective of whether or not such conventions or agreements were abrogated or suspended upon or since the outbreak of war by the domestic law of Japan or of the Allied Power concerned.

(ii) Without the need for application by the proprietor of the right and without the payment of any fee or compliance with any other formality, the period from December 7, 1941, until the coming into force of the present Treaty between Japan and the Allied Power concerned shall be excluded from the running of the normal term of such rights; and such period, with an additional period of six months, shall be excluded from the time within which a literary work must be translated into Japanese in order to obtain translating rights in Japan.

Article 16

As an expression of its desire to indemnify those members of the armed forces of the Allied Powers who suffered undue hardships while prisoners of war of Japan, Japan will transfer its assets and those of its nationals in countries which were neutral during the war, or which were at war with any of the Allied Powers, or, at its option, the equivalent of such assets, to the International Committee of the Red Cross which shall liquidate such assets and distribute the resultant fund to appropriate national agencies, for the benefit of former prisoners of war and their families on such basis as it may determine to be equitable. The categories of assets described in Article 14(a)2(II)(ii) through (v) of the present Treaty shall be excepted from transfer, as well as assets of Japanese natural persons not residents of Japan on the first coming into force of the Treaty. It is equally understood that the transfer provision of this Article has no

application to the 19,770 shares in the Bank for International Settlements presently owned by Japanese financial institutions.

Article 17

(a) Upon the request of any of the Allied Powers, the Japanese Government shall review and revise in conformity with international law any decision or order of the Japanese Prize Courts in cases involving ownership rights of nationals of that Allied Power and shall supply copies of all documents comprising the records of these cases, including the decisions taken and orders issued. In any case in which such review or revision shows that restoration is due, the provisions of Article 15 shall apply to the property concerned.

(b) The Japanese Government shall take the necessary measures to enable nationals of any of the Allied Powers at any time within one year from the coming into force of the present Treaty between Japan and the Allied Power concerned to submit to the appropriate Japanese authorities for review any judgment given by a Japanese court between 7 December 1941 and such coming into force, in any proceedings in which any such national was unable to make adequate presentation of his case either as plaintiff or defendant. The Japanese Government shall provide that, where the national has suffered injury by reason of any such judgment, he shall be restored in the position in which he was before the judgment was given or shall be afforded such relief as may be just and equitable in the circumstances.

Article 18

(a) It is recognized that the intervention of the state of war has not affected the obligation to pay pecuniary debts arising out of obligations and contracts (including those in respect of bonds) which existed and rights which were acquired before the existence of a state of war, and which are due by the Government or nationals of Japan to the Government or nationals of one of the Allied Powers, or are due by the

Government or nationals of one of the Allied Powers to the Government or nationals of Japan. The intervention of a state of war shall equally not be regarded as affecting the obligation to consider on their merits claims for loss or damage to property or for personal injury or death which arose before the existence of a state of war, and which may be presented or re-presented by the Government of one of the Allied Powers to the Government of Japan, or by the Government of Japan to any of the Governments of the Allied Powers. The provisions of this paragraph are without prejudice to the rights conferred by Article 14.

(b) Japan affirms its liability for the prewar external debt of the Japanese State and for debts of corporate bodies subsequently declared to be liabilities of the Japanese State, and expresses its intention to enter into negotiations at an early date with its creditors with respect to the resumption of payments on those debts; to encourage negotiations in respect to other prewar claims and obligations; and to facilitate the transfer of sums accordingly.

Article 19

(a) Japan waives all claims of Japan and its nationals against the Allied Powers and their nationals arising out of the war or out of actions taken because of the existence of a state of war, and waives all claims arising from the presence, operations or actions of forces or authorities of any of the Allied Powers in Japanese territory prior to the coming into force of the present Treaty.

(b) The foregoing waiver includes any claims arising out of actions taken by any of the Allied Powers with respect to Japanese ships between September 1, 1939, and the coming into force of the present Treaty, as well as any claims and debts arising in respect to Japanese prisoners of war and civilian internees in the hands of the Allied Powers, but does not include

*Appendix A*

Japanese claims specifically recognized in the laws of any Allied Power enacted since September 2, 1945.

(c) Subject to reciprocal renunciation, the Japanese Government also renounces all claims (including debts) against Germany and German nationals on behalf of the Japanese Government and Japanese nationals, including intergovernmental claims and claims for loss or damage sustained during the war, but excepting (a) claims in respect of contracts entered into and rights acquired before September 1, 1939, and (b) claims arising out of trade and financial relations between Japan and Germany after September 2, 1945. Such renunciation shall not prejudice actions taken in accordance with Articles 16 and 20 of the present Treaty.

(d) Japan recognizes the validity of all acts and omissions done during the period of occupation under or in consequence of directives of the occupation authorities or authorized by Japanese law at that time, and will take no action subjecting Allied nationals to civil or criminal liability arising out of such acts or omissions.

Article 20

Japan will take all necessary measures to ensure such disposition of German assets in Japan as has been or may be determined by those powers entitled under the Protocol of the proceedings of the Berlin Conference of 1945 to dispose of those assets, and pending the final disposition of such assets will be responsible for the conservation and administration thereof.

Article 21

Notwithstanding the provisions of Article 25 of the present Treaty, China shall be entitled to the benefits of Articles 10 and 14(a)2; and Korea to the benefits of Articles 2, 4, 9 and 12 of the present Treaty.

*Appendix A*

## CHAPTER VI

## SETTLEMENT OF DISPUTES

### Article 22

If in the opinion of any Party to the present Treaty there has arisen a dispute concerning the interpretation or execution of the Treaty, which is not settled by reference to a special claims tribunal or by other agreed means, the dispute shall, at the request of any party thereto, be referred for decision to the International Court of Justice. Japan and those Allied Powers which are not already parties to the Statute of the International Court of Justice will deposit with the Registrar of the Court, at the time of their respective ratifications of the present Treaty, and in conformity with the resolution of the United Nations Security Council, dated October 15, 1946, a general declaration accepting the jurisdiction, without special agreement, of the Court generally in respect to all disputes of the character referred to in this Article.

## CHAPTER VII

## FINAL CLAUSES

### Article 23

(a) The present Treaty shall be ratified by the States which sign it, including Japan, and will come into force for all the States which have then ratified it, when instruments of ratification have been deposited by Japan and by a majority, including the United States of America as the principal occupying Power, of the following States, namely Australia, Canada, Ceylon, France, Indonesia, the Kingdom of the Netherlands, New Zealand, Pakistan, the Republic of the Philippines, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. The present Treaty shall come into force of each State

which subsequently ratifies it, on the date of the deposit of its instrument of ratification.

(b) If the Treaty has not come into force within nine months after the date of the deposit of Japan's ratification, any State which has ratified it may bring the Treaty into force between itself and Japan by a notification to that effect given to the Governments of Japan and the United States of America not later than three years after the date of deposit of Japan's ratification.

Article 24

All instruments of ratification shall be deposited with the Government of the United States of America which will notify all the signatory States of each such deposit, of the date of the coming into force of the Treaty under paragraph (a) of Article 23, and of any notifications made under paragraph (b) of Article 23.

Article 25

For the purposes of the present Treaty the Allied Powers shall be the States at war with Japan, or any State which previously formed a part of the territory of a State named in Article 23, provided that in each case the State concerned has signed and ratified the Treaty. Subject to the provisions of Article 21, the present Treaty shall not confer any rights, titles or benefits on any State which is not an Allied Power as herein defined; nor shall any right, title or interest of Japan be deemed to be diminished or prejudiced by any provision of the Treaty in favor of a State which is not an Allied Power as so defined.

Article 26

Japan will be prepared to conclude with any State which signed or adhered to the United Nations Declaration of January 1, 1942, and which is at war with Japan, or with any State which

previously formed a part of the territory of a State named in Article 23, which is not a signatory of the present Treaty, a bilateral Treaty of Peace on the same or substantially the same terms as are provided for in the present Treaty, but this obligation on the part of Japan will expire three years after the first coming into force of the present Treaty. Should Japan make a peace settlement or war claims settlement with any State granting that State greater advantages than those provided by the present Treaty, those same advantages shall be extended to the parties to the present Treaty.

Article 27

The present Treaty shall be deposited in the archives of the Government of the United States of America which shall furnish each signatory State with a certified copy thereof.

*Appendix B*

# AGREEMENT ON THE SETTLEMENT OF PROBLEMS CONCERNING PROPERTY AND CLAIMS AND ON THE ECONOMIC CO-OPERATION BETWEEN JAPAN AND THE REPUBLIC OF KOREA

**June 22, 1965**
**Tokyo, Japan**

Japan and the Republic of Korea,

Desiring to settle [the] problem concerning property of the two countries and their nationals and claims between the two countries and their nationals; and

Desiring to promote the economic co-operation between the two countries;

Have agreed as follows:

## Article I

1. To the Republic of Korea Japan shall:

(a) Supply the products of Japan and the services of the Japanese people, the total value of which will be so much in yen as shall be equivalent to three hundred million United States dollars ($300,000,000) at present computed at one hundred and eight billion yen (¥108,000,000,000), *in grants* [on a non-repayable basis] within the period of ten years from the date of the entry into force of the present Agreement. The supply of such products and services in each year *shall be limited to* [shall be such] such amount in yen as shall be equivalent to thirty million United States dollars ($30,000,000) at present computed at ten billion eight hundred million yen (¥10,800,000,000); in case the supply of any one year falls short of the set amount, the remainder shall be added to the amounts of the supplies for the next and subsequent years. However, *the ceiling on* the amount

of the supply for any one year can be *raised* [increased] by agreement between the Governments of the Contracting Parties.

(b) Extend long-term and low-interest loans up to such amount in yen as shall be equivalent to two hundred million United States dollars ($200,000,000) at present computed at seventy-two billion yen (¥72,000,000,000), which the Government of the Republic of Korea may request and which shall be used for the procurement by the Republic of Korea of the products of Japan and the services of the Japanese people necessary in implementing the projects to be determined in accordance with arrangements to be concluded under the provisions of paragraph 3 of the present Article, within the period of ten years from the date of the entry into force of the present Agreement. Such loans shall be extended by the Overseas Economic Co-operation Fund of Japan, and the Government of Japan shall take necessary measures in order that the said Fund will be able to secure the necessary funds for implementing the loans evenly each year.

The above-mentioned supply and loans should be such that will be conducive to the economic development of the Republic of Korea.

2. The Governments of the Contracting Parties shall establish, as an organ of consultation between the two Governments with powers to recommend on matters concerning the implementation of the provisions of the present Article, a Joint Committee composed of representatives of the two Governments.

3. The Governments of the Contracting Parties shall conclude necessary arrangements for the implementation of the provisions of the present Article.

*Appendix B*

Article II

1. The Contracting Parties confirm that [the] problem concerning property, rights and interests of the two Contracting Parties and their nationals (including juridical persons) and concerning claims between the Contracting Parties and their nationals, including those provided for in Article IV, paragraph (a) of the Treaty of Peace with Japan signed at the city of San Francisco on September 8, 1951, is settled completely and finally.

2. The provisions of the present Article shall not affect the following (excluding those subject to the special measures which the respective Contracting Parties have taken by the date of the signing of the present Agreement):

(a) Property, rights and interests of those nationals of either Contracting Party who have ever resided in the other country in the period between August 15, 1947, and the date of the signing of the present Agreement;

(b) Property, rights and interests of either Contracting Party and its nationals, which have been acquired or have come within the jurisdiction of the other Contracting Party in the course of normal contacts on or after August 15, 1945.

3. Subject to the provisions of paragraph 2, no contention shall be made with respect to the measures on property, rights and interests of either Contracting Party and its nationals which are within the jurisdiction of other Contracting Party on the date of the signing of the present Agreement, or with respect to any claims of either Contracting Party and its nationals against the other Contracting Party and its nationals arising from the causes which occurred on or before the said date.

*Appendix B*

Article III

1. Any dispute between the Contracting Parties concerning the interpretation and implementation of the present Agreement shall be settled, first of all, through diplomatic channels.

2. Any dispute which fails to be settled under the provision of paragraph 1 shall be referred for decision to an arbitration board composed of three arbitrators, one to be appointed by the Government of each Contracting Party within a period of thirty days from the date of receipt by the Government of either Contracting Party from the Government of the other of a note requesting arbitration of the dispute, and the third to be agreed upon by the two arbitrators so chosen within a further period of thirty days or the third arbitrator to be appointed by the government of a third country agreed upon within such further period by the two arbitrators, provided that the third arbitrator shall not be a national of either Contracting Party.

3. If, within the periods respectively referred to, the Government of either Contracting Party fails to appoint an arbitrator, or the third arbitrator or a third country is not agreed upon, the arbitration board shall be composed of the two arbitrators to be designated by each of the governments of the two countries respectively chosen by the Governments of the Contracting Parties within a period of thirty days and the third arbitrator to be designated by the government of a third country to be determined upon consultation between the governments so chosen.

4. The Governments of the Contracting Parties shall abide by any award made by the arbitration board under the provisions of the present Article.

Article IV

The present Agreement shall be ratified. The instruments of ratification shall be exchanged at Seoul as soon as possible. The

present Agreement shall enter into force on the date of the exchange of the instruments of ratification.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed the present Agreement.

DONE in duplicate at Tokyo, in the Japanese and Korean languages, both being equally authentic, this twenty-second day of June of the year one thousand nine hundred and sixty-five.

| For Japan: | For the Republic of Korea: |
|---|---|
| Etsusaburo Shiina | Tong Won Lee |
| Shinichi Takasugi | Dong Jo Kim |

*Appendix C*

# TREATY OF PEACE BETWEEN THE REPUBLIC OF CHINA AND JAPAN

**April 28, 1952**
**Taipei, Taiwan**

The Republic of China and Japan,

Considering their mutual desire for good neighborliness in view of their historical and cultural ties and geographical proximity;

Realizing the importance of their close cooperation to the promotion of their common welfare and to the maintenance of international peace and security;

Recognizing the need of a settlement of problems that have arisen as a result of the existence of a state of war between them;

Have resolved to conclude a Treaty of Peace and have accordingly appointed as their Plenipotentiaries,

His Excellency the President of the Republic of China: Mr. Yeh Kung Chao;

The Government of Japan: Mr. Isao Kawada;

Who, having communicated to each other their full powers found to be in good and due form, have agreed upon the following articles:

*Appendix C*

***Article I***

The state of war between the Republic of China and Japan is terminated as from the date on which the present Treaty enters into force.

***Article II***

It is recognized that under Article 2 of the Treaty of Peace with Japan signed at the city of San Francisco in the United States of America on September 8, 1951 (hereinafter referred to as the San Francisco Treaty), Japan has renounced all right, title and claim to Taiwan (Formosa) and Penghu (the Pescadores) as well as the Spratly Islands and the Paracel Islands.

***Article III***

The disposition of property of Japan and its nationals in Taiwan (Formosa) and Penghu (the Pescadores), and their claims, including debts, against the authorities of the Republic of China in Taiwan (Formosa) and Penghu (the Pescadores) and the residents thereof, and the disposition in Japan of property of such authorities and residents and their claims, including debts, against Japan and its nationals, shall be the subject of special arrangements between the Government of the Republic of China and the Government of Japan. The terms nationals and residents whenever used in the present Treaty include juridical persons.

***Article IV***

It is recognized that all treaties, conventions and agreements concluded before December 9, 1941, between China and Japan have become null and void as a consequence of the war.

***Article V***

It is recognized that under the provisions of Article 10 of the San Francisco Treaty, Japan has renounced all special rights and

its interests in China, including all benefits and privileges resulting from the provisions of the final Protocol signed at Peking on September 7, 1901, and all annexes, notes and documents supplementary thereto, and has agreed to the abrogation in respect to Japan of the said protocol, annexes, notes and documents.

***Article VI***

(a) The Republic of China and Japan will be guided by the principles of Article 2 of the Charter of the United Nations in their mutual relations.

(b) The Republic of China and Japan will cooperate in accordance with the principles of the Charter of the United Nations and, in particular, will promote their common welfare through friendly cooperation in the economic field.

***Article VII***

The Republic of China and Japan will endeavor to conclude, as soon as possible, a treaty or agreement to place their trading, maritime and other commercial relations, on a stable and friendly basis.

***Article VIII***

The Republic of China and Japan will endeavor to conclude, as soon as possible, an agreement relating to civil air transport.

***Article IX***

The Republic of China and Japan will endeavor to conclude, as soon as possible, an agreement providing for the regulation or limitation of fishing and the conservation and development of fisheries on the high seas.

*Appendix C*

***Article X***

For the purposes of the present Treaty, nationals of the Republic of China shall be deemed to include all the inhabitants and former inhabitants of Taiwan (Formosa) and Penghu (the Pescadores) and their descendents who are of the Chinese nationality in accordance with the laws and regulations which have been or may hereafter be enforced by the Republic of China in Taiwan (Formosa) and Penghu (the Pescadores); and juridical persons of the Republic of China shall be deemed to include all those registered under the laws and regulations which have been or may hereafter be enforced by the Republic of China in Taiwan (Formosa) and Penghu (the Pescadores).

***Article XI***

Unless otherwise provided for in the present Treaty and the documents supplementary thereto, any problem arising between the Republic of China and Japan as a result of the existence of a state of war shall be settled in accordance with the relevant provisions of the San Francisco Treaty.

***Article XII***

Any dispute that may arise out of the interpretation or application of the present Treaty shall be settled by negotiation or other pacific means.

***Article XIII***

The present Treaty shall be ratified and the instruments of ratification shall be exchanged at Taipei as soon as possible. The present Treaty shall enter into force as from the date on which such instruments of ratification are exchanged.

*Appendix C*

***Article XIV***

The present Treaty shall be in the Chinese, Japanese, and English languages. In case of any divergence of interpretation, the English text shall prevail.

IN WITNESS WHEREOF, the respective Plenipotentiaries have signed the present Treaty and have affixed thereto their seals.

DONE in duplicate at Taipei, this Twenty Eighth day of the Fourth month of the Forty First year of the Republic of China, corresponding to the Twenty Eighth day of the Fourth month of the Twenty Seventh year of Showa of Japan and to the Twenty Eighth day of April in the year One Thousand Nine Hundred and Fifty Two.

| For the Republic of China: | For Japan: |
| --- | --- |
| Yeh Kung Chao | Isao Kawada |

*Appendix D*

## JOINT COMMUNIQUÉ OF THE GOVERNMENT OF JAPAN AND THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA

**September 29, 1972**
**Peking, People's Republic of China**

Prime Minister Kakuei Tanaka of Japan visited the People's Republic of China at the invitation of Premier of the State Council Chou En-lai of the People's Republic of China from September 25 to September 30, 1972. Accompanying Prime Minister Tanaka were Minister for Foreign Affairs Masayoshi Ohira, Chief Cabinet Secretary Susumu Nikaido and other government officials.

Chairman Mao Tse-tung met Prime Minister Kakuei Tanaka on September 27. They had an earnest and friendly conversation.

Prime Minister Tanaka and Minister for Foreign Affairs Ohira had an earnest and frank exchange of views with Premier Chou En-lai and Minister for Foreign Affairs Chi Peng-fei in a friendly atmosphere throughout on the question of the normalization of relations between Japan and China and other problems between the two countries as well as on other matters of interest to both sides, and agreed to issue the following Joint Communiqué of the two Governments:

Japan and China are neighboring countries, separated only by a strip of water with a long history of traditional friendship. The peoples of the two countries earnestly desire to put an end to the abnormal state of affairs that has hitherto existed between the two countries. The realization of the aspiration of the two peoples for the termination of the state of war and the normalization of relations between Japan and China will add a new page to the annals of relations between the two countries.

The Japanese side is keenly conscious of the responsibility for the serious damage that Japan caused in the past to the Chinese

people through war, and deeply reproaches itself. Further, the Japanese side reaffirms its position that it intends to realize the normalization of relations between the two countries from the stand of fully understanding "the three principles for the restoration of relations" put forward by the Government of the People's Republic of China. The Chinese side expresses its welcome for this.

In spite of the differences in their social systems existing between the two countries, the two countries should, and can, establish relations of peace and friendship. The normalization of relations and development of good-neighborly and friendly relations between the two countries are in the interests of the two peoples and will contribute to the relaxation of tension in Asia and peace in the world.

1. The abnormal state of affairs that has hitherto existed between Japan and the People's Republic of China is terminated on the date on which this Joint Communiqué is issued.

2. The Government of Japan recognizes that Government of the People's Republic of China as the sole legal Government of China.

3. The Government of the People's Republic of China reiterates that Taiwan is an inalienable part of the territory of the People's Republic of China. The Government of Japan fully understands and respects this stand of the Government of the People's Republic of China, and it firmly maintains its stand under Article 8 of the Potsdam Proclamation.

4. The Government of Japan and the Government of People's Republic of China have decided to establish diplomatic relations as from September 29, 1972. The two Governments have decided to take all necessary measures for the establishment and the performance of the functions of each other's embassy in their respective capitals in accordance with

international law and practice, and to exchange ambassadors as speedily as possible.

5. The Government of the People's Republic of China declares that in the interest of the friendship between the Chinese and the Japanese peoples, it renounces its demand for war reparation from Japan.

6. The Government of Japan and the Government of the People's Republic of China agree to establish relations of perpetual peace and friendship between the two countries on the basis of the principles of mutual respect for sovereignty and territorial integrity, mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit and peaceful co-existence.

The two Governments confirm that, in conformity with the foregoing principles and the principles of the Charter of the United Nations, Japan and China shall in their mutual relations settle all disputes by peaceful means and shall refrain from the use or threat of force.

7. The normalization of relations between Japan and China is not directed against any third country. Neither of the two countries should seek hegemony in the Asia-Pacific region and each is opposed to efforts by any other country or group of countries to establish such hegemony.

8. The Government of Japan and the Government of the People's Republic of China have agreed that, with a view to solidifying and developing the relations of peace and friendship between the two countries, the two Governments will enter into negotiations for the purpose of concluding a treaty of peace and friendship.

9. The Government of Japan and the Government of the People's Republic of China have agreed that, with a view to further promoting relations between the two countries and to

*Appendix D*

expanding interchanges of people, the two Governments will, as necessary and taking account of the existing non-governmental arrangements, enter into negotiations for the purpose of concluding agreements concerning such matters as trade, shipping, aviation, and fisheries.

Done at Peking, September 29, 1972

Prime Minister of Japan
Minister for Foreign Affairs of Japan

Premier of the State Council of the People's Republic of China
Minister for Foreign Affairs of the People's Republic of China

*Appendix E*

# TREATY OF PEACE AND FRIENDSHIP BETWEEN THE PEOPLE'S REPUBLIC OF CHINA AND JAPAN

**August 12, 1978**
**Peking, People's Republic of China**

The People's Republic of China and Japan,

Recalling with satisfaction that since the Government of the People's Republic of China and the Government of Japan issued a Joint Statement in Peking on September 29, 1972, the friendly relations between the two Governments and the peoples of the two countries have developed greatly on a new basis,

Confirming that the above-mentioned Joint Statement constitutes the basis of the relations of peace and friendship between the two countries and that the principles enunciated in the Joint Statement should be strictly observed,

Confirming that the principles of the Charter of the United Nations should be fully respected,

Hoping to contribute to peace and stability in Asia and in the world,

For the purpose of solidifying and developing the relations of peace and friendship between the two countries,

Have resolved to conclude a Treaty of Peace and Friendship and for that purpose have appointed as their Plenipotentiaries:

The People's Republic of China:
Huang Hua, Minister for Foreign Affairs

Japan:
Sunao Sonoda, Minister for Foreign Affairs

*Appendix E*

Who, having communicated to each other their full powers, found to be in good and due form, have agreed as follows:

**Article I**

1. The Contracting Parties shall develop durable relations of peace and friendship between the two countries on the basis of the principles of mutual respect for sovereignty and territorial integrity, mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit and peaceful coexistence.

2. In keeping with the foregoing principles and the principles of the United Nations Charter, the Contracting Parties affirm that in their mutual relations, all disputes shall be settled by peaceful means without resorting to the use or threat of force.

**Article II**

The Contracting Parties declare that neither of them should seek hegemony in the Asia-Pacific region or in any other region and that each is opposed to efforts by any other country or group of countries to establish such hegemony.

**Article III**

The Contracting Parties shall, in a good-neighbourly and friendly spirit and in conformity with the principles of equality and mutual benefit and non-interference in each other's internal affairs, endeavour to further develop economic and cultural relations between the two countries and to promote exchanges between the peoples of the two countries.

**Article IV**

The present Treaty shall not affect the position of either Contracting Party regarding its relations with third countries.

*Appendix E*

**Article V**

1. The present Treaty shall be ratified and shall enter into force on the date of the exchange of instruments of ratification which shall take place at Tokyo. The present Treaty shall remain in force for ten years and thereafter shall continue to be in force until terminated in accordance with the provisions of paragraph 2 of this Article.

2. Either Contracting Party may, by giving one year's written notice to the other Contracting Party, terminate the present Treaty at the end of the initial ten-year period or at any time thereafter.

In witness whereof the respective Plenipotentiaries have signed the present Treaty and have affixed thereto their seals.

Done in duplicate in the Chinese and Japanese languages, both texts being equally authentic, at Peking, this twelfth day of August 1978.

For the People's Republic of China:
Huang Hua

For Japan:
Sunao Sonoda

*Appendix F*

Nos. 01-17197, 01-17201, 01-17203, 01-17207
01-17211, 01-17243, and 01-17251

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**IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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SUK YOON KIM, et al.,
Plaintiffs-Appellants,

v.

ISHKAWAJIMA HIRIMA HEAVY INDUS. CO., LTD., et al.,
Defendants-Appellees.

---

BRIEF FOR AMICUS CURIAE THE UNITED STATES OF AMERICA CONCERNING GROUP 4 IN SUPPORT OF AFFIRMANCE

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, THE HONORABLE VAUGHN R. WALKER

---

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## INTRODUCTION

The Constitution assigns to the Federal Government exclusive responsibility for conducting the nation's foreign policy. At the conclusion of World War II, the President and Senate determined that the United States' interests in security and stability in Asia would be best served by rebuilding Japan into a strong, democratic ally. They recognized that this would not be possible as long as Japan and its industrial base were subject to ongoing compensation claims arising out of the war. At the same time, the United States insisted that Japan pay some compensation for the untold injury it had caused during the war.

Balancing these interests, the Treaty of Peace between the United States, other Allied nations, and Japan, provided for resolution, on a government-to-government basis, of all war related claims and, in return, required Japan to relinquish billions of dollars in foreign assets to those who had suffered at the hands of the Japanese.

Now, half a century after the war's end, the California legislature has adopted a statute that encourages litigation of precisely those claims that the Treaty provided should be resolved by inter-governmental arrangement. California's World War II forced labor statute goes far beyond the State's legitimate domestic interests and interferes in a direct and significant way in matters of foreign relations, undermining in the process long-established federal policy.

## BACKGROUND

### 1. The 1951 Treaty of Peace.

The Treaty of Peace signed on September 8, 1951 between the United States, 47 other Allied powers, and Japan formally concluded World War II with respect to the Pacific Theater. *See* 3 U.S.T. 3169. The Treaty reflects the United States

government's foreign policy determination that all war-related claims against Japan and its nationals — including private claims and including the claims of those whose governments were not party to the Treaty — should be resolved by government-to government agreement rather than litigation.[1]

John Foster Dulles, the United States' principal negotiator, believed that continued demands for war claims compensation would prevent Japan's economic recovery and its development into a reliable democratic ally against communism. The Korean War had begun; communist forces had taken control of the Chinese mainland; and Soviet expansionism was a world-wide threat. Japan was at the center of these geopolitical forces. The United States viewed an economically stable, anti-communist Japan as essential to the United States' interests in the Pacific region. Japan could not play that role if it were subject to continuing war-related claims that might stifle its economy. *See generally* August 2000 Statement, 3-7 [Signatory SER 340-44].

Nor did the United States and the Allies want to repeat the experience of the Versailles Treaty after World War I, which many consider to be one of the root causes of World War II. *See generally id.* at 4-6 [Signatory SER 341-43]. Finally, the United States government, having assumed sole responsibility for Japan's recovery during the occupation of Japan following the war, concluded that any substantial payment of war-related claims ultimately would come out of the pockets of the American taxpayers. *See ibid.* For these reasons, the President, and the Senate in its advise-and-consent role, determined that

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[1] The history of the 1951 Treaty is discussed in much greater detail, with extensive citations to the historical record, in the August 9, 2000, and December 6, 2000, Statements of Interest filed by the United States with the district court. *See* Supplemental Excerpts of Record Concerning Groups 1, 2, & 3 [Signatory SER], 328 ("August 2000 Statement"); Supplemental Excerpts of Record filed in Kim et al [Non-Signatory SER], 498 ("December 2000 Statement").

all claims against Japan and its nationals should be waived in exchange for the forfeiture by Japan and its nationals of their foreign assets.

The Allied nations that are parties to the Treaty, including the United States, expressly waived all claims that they or their nationals might have against Japan and its nationals arising out of the war. Article 14 of the Treaty authorized Allied governments "to seize * * * all property, rights and interests of * * * Japan and Japanese Nationals" located in the Allies' respective jurisdictions in exchange for a commitment by Japan to help rebuild the territory it had occupied and a waiver of claims by Allied governments and their nationals against Japan and Japanese nationals. Art. 14. The waiver provision states:

> Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.

Art. 14(b).

In addition to finally resolving the Allies' own war claims and those of their nationals, the Treaty also provided that the war claims of non-signatory countries and their nationals were to be resolved by government-to-government negotiations. These claims, especially those of China and Korea, were extremely large. Japan's infamous conduct in Nanking and its use of Asian slave labor was well documented by the time of the Treaty's negotiation. *See* December 2000 Statement, 4-6 [Non-Signatory SER 507-09]. If left unresolved, these potentially enormous liabilities would likely have prevented Japan's economic recovery. Permitting assertion of these claims would thus have been flatly at odds with one of the chief reasons for the Allies' agreement to waive their own claims and

those of their nationals. *See ibid.* *See also* Memorandum of Conversation, by the Officer in Charge of Korean Affairs (Emmons), Washington, Jan. 17, 1951 (Ex. 8 to the December 2000 Statement) ("any reparations which might be paid to the Koreans by the Japanese would in fact come from the United States taxpayers"). The Allies thus determined that the Treaty should also provide for the resolution of these nonsignatory claims.

Implementing this policy posed significant difficulties. No consensus existed among the Allies as to whether the People's Republic of China ("PRC") or the Republic of China ("Taiwan") legally represented China. Neither could Korea be a party to the Treaty because Korea, as part of the Japanese empire, had fought against the Allies during the Pacific War. As a result of these complications, no Chinese or Korean political entities signed the 1951 Treaty, and Article 14(b)'s waiver provision does not, by its own terms, cover the PRC, Taiwan, or North or South Korea. *See generally* December 2000 Statement 4-6 [Non-Signatory SER 507-09].

To achieve their foreign policy goals, the Allies inserted into the Treaty several other provisions intended to ensure that Chinese and Korean war claims against Japan were also resolved through government-to-government arrangements. Although China and Korea were not signatories, the Treaty provided that China and Korea would receive from Japan the same compensation that the Allies had obtained for themselves in return for waiving their claims. In turn, the Treaty obligated Japan to enter into bilateral agreements with Chinese and Korean representatives on terms similar to those provided in the Treaty.

Article 21 of the Treaty gave China the benefits of Articles 10, in which Japan renounced all rights and interests in China, and 14(a)2, which authorized China to seize and liquidate all assets of Japan and Japanese nationals located in Chinese territory. These provisions were extremely significant to China;

almost half of all Japanese-owned foreign assets were located in China. *See* December 2000 Statement at 4 [Non-Signatory SER 507]. In return, Article 26 provided that Japan was expected to enter into a separate treaty settling the war with a Chinese political entity "*on the same or substantially the same terms as are provided for in the present Treaty.*" Art. 26 (emphasis added). As contemplated by Article 26, a subsequent treaty between Japan and the Republic of China ("Taiwan") states that "property of such authorities and residents [of Taiwan] and their claims against Japan and its nationals, shall be the subject of special arrangements between the Government of the Republic of China and the Government of Japan." *See* Treaty of Peace Between the Republic of China and Japan, April 28, 1952, 1858 U.N.T.S. 38 [Non-Signatory SER .

The Treaty of Peace dealt with Korean war claims against Japan in a similar fashion. Article 21 stated that Korea was entitled to the benefits of Articles 2, 4, 9, and 12 of the Treaty. Article 2 required Japan to recognize Korea's independence and renounce all claims to Korea. Article 4(b), as construed by the United States, gave Korea the same benefits the Allies had obtained for themselves. It authorized the seizure by Korean authorities of all Japanese-owned assets in Korea – assets worth billions of dollars. *See* December 2000 Statement, 8 [Non-Signatory SER 511]. In turn, Article 4(a) provided that the "claims * * * of [Korean] authorities and residents against Japan and its nationals, shall be the subject of special arrangements between Japan and [Korean] authorities."

As contemplated in Article 4(a), Japan and the Republic of Korea ("South Korea") entered into an agreement in 1965, following years of protracted negotiations in which the United States was heavily involved. 8473 U.N.T.S. 258 [Non-Signatory SER, 352]. The terms of this agreement were greatly influenced by the fact that Korea had already received substantial compensation under Article 4(b) of the 1951 Treaty. Article II.1 of the Japan-ROK treaty specifically provides that

the "problem * * * concerning claims between the Contracting Parties and their nationals, including those provided for in Article IV, paragraph (a) of the [1951] Treaty of Peace * * * is settled completely and finally." Non-Signatory SER, 354. A similar agreement between Japan and North Korea is currently under negotiation.

2. California's World War II Forced Labor Statute.

In 1999, California enacted a statute that permits World War II slave and forced laborers to sue the companies that benefited from their labor. *See* Cal. Code of Civ. Pro. § 354.6. The author of the provision, State Senator Tom Hayden, stated at the time of its enactment that the law was intended to "*send[] a very powerful message from California to the U.S. government and the German government,* who are in the midst of rather closed negotiations about a settlement" of World War II-era claims. *See* Henry Weinstein, *Bill Signed Bolstering Holocaust-Era Claims*, Los Angeles Times, July 29, 1999, at A3 (1999 WL 2181642) (emphasis added). The "message," according to Hayden, was that "[i]f the international negotiators want to avoid very expensive litigation by survivors * * *, they ought to settle. Otherwise, this law allows us to go ahead and take them to court." *Ibid.*

The California statute creates a cause of action for victims of slave labor practices of the "Nazi regime, its allies and sympathizers" with uniquely favorable substantive and procedural rules. *See* Cal. Civ. Pro. § 354.6. The statute permits any "prisoner-of-war," "concentration camp" prisoner, or "member of the civilian population conquered by the Nazi regime, its allies or sympathizers," who was forced "to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers," or companies within their jurisdictions, to bring suit to recover the "market value" of the labor they performed. *Ibid.* California has defined the cause of action so as to remove any defense

based on the law of the place where the conduct occurred, *id.* § 354.6(b), affixed damages in a manner to eliminate the effect of post-war inflation, *id.* § 354.6(a)(3), made corporations doing business in California liable for the debts of their Asian and European affiliates, without regard to traditional principles of corporate identity, *id.* § 354.6(b), and set aside generally-applicable statutes of limitations in favor of a limitations period that extends to 2010, *id.* § 354.6(c).

3. Proceedings in the District Court

Plaintiffs are nationals of China and Korea who allege that, during World War II, they were forced by the Japanese government to perform labor for Japanese companies in support of Japan's war effort. *See, e.g.*, Non-Signatory ER 11-25, 43-57, 98-99. Plaintiffs, purporting to represent all similarly situated Korean and Chinese nationals, filed class action suits against the companies for which they were forced to work as well as their American affiliates. Plaintiffs allege claims under California's Section 354.6 as well as common law causes of action. Defendants moved to dismiss, arguing, among other grounds, that plaintiffs' claims present non-justiciable political questions, that the suits are barred by the 1951 Treaty of Peace, and that California's forced labor statute is unconstitutional.

The United States, appearing as amicus curiae, filed a Statement of Interest supporting dismissal. The United States explained that California's forced labor statute frustrates the foreign policy of the United States, established in the 1951 Treaty of Peace, that claims such as plaintiffs' are to be resolved through government-to-government arrangements rather than through litigation.

On September 17, 2001, the district court dismissed plaintiffs' claims. *See In re World War II Era Japanese Forced Labor Litigation*, 164 F. Supp. 2d 1160 (N.D. Cal. 2001). Although the district court found that the Treaty of Peace did

not directly bar plaintiffs' claims, because neither Korea nor China had signed the Treaty, *id.* at 1165-66, the court held that the California legislature had impermissibly attempted to intrude into the conduct of foreign policy when it attempted to create a cause of action for wrongs committed by Japan and its nationals during World War II, *id.* at 1166-78. With respect to plaintiffs' Alien Tort Statute and remaining state-law claims, the court held that, even under the longest statute of limitations that might arguably apply, plaintiffs' claims were time-barred. *Id.* at 1178-83.

## SUMMARY OF ARGUMENT

1. The Constitution grants to the Federal Government exclusive authority to conduct the nation's foreign relations, an area that the Framers determined should "be left entirely free from local interference." *Hines v. Davidowitz,* 312 U.S. 52, 63 (1941). The Supreme Court has enforced the constitutional design by striking down state laws that would frustrate the objectives of established federal foreign policy and, even in the absence of federal action, setting aside state regulations that have more than an indirect effect on the nation's foreign relations. Under these precedents, California's policy of promoting litigation of World War II forced labor claims must give way. The State's foreign policy conflicts with the considered judgment of the President and Senate, reflected in the 1951 Treaty of Peace, that such claims against Japanese nationals should be resolved by government-to-government agreement, rather than individual litigation.

2. Section 354.6 also violates additional constitutional limits on the jurisdictional reach of state law. It is an inherent constraint of our federal system of government, reflected in both the Commerce Clause and Due Process Clause of the United States Constitution, that each State may legislate only with respect to matters that take place within its borders. A

contrary view would permit the proliferation of conflicting legal obligations.

California's forced labor statute is a clear example of extraterritorial legislation. The conduct that California seeks to regulate took place exclusively in foreign lands, with no perceptible connection to California. The fact that certain named plaintiffs have subsequently moved to California does not give California the authority to apply its substantive law to events that took place entirely outside the State's boundaries.

The legislation cannot be saved by casting it as a mere "statute of limitations." The structure and language of Section 354.6 betray the State's attempt to define the substantive as well as procedural rules under which the defendants' liability is to be determined.

## ARGUMENT

### I. THE CONSTITUTION PRECLUDES CALIFORNIA FROM INTERFERING IN THE FEDERAL GOVERNMENT'S DETERMINATION THAT PLAINTIFFS' CLAIMS SHOULD BE RESOLVED THROUGH GOVERNMENT-TO-GOVERNMENT ARRANGEMENTS.

#### A. The Constitution Vests Full and Exclusive Responsibility For Foreign Relations In The Federal Government.

From the earliest days of the Republic, the Supreme Court has recognized that the Constitution's specific commitment of foreign affairs powers to the national government[2] and the

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[2] The Constitution grants to Congress the authority "[t]o regulate Commerce with foreign Nations," U.S. Const. Art. I, § 8, cl. 3, and "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," *id.*, cl. 10. The Constitution also designates the President as the "Commander in Chief of the Army and Navy of the

express prohibitions on the States' activities in that sphere[3] reflect a general rule of exclusive federal authority over international relations. "Power over external affairs is not shared by the States; it is vested in the national government exclusively." *United States v. Pink*, 315 U.S. 203, 233 (1942). *See also Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (the Federal Government is entrusted "with full and exclusive responsibility for the conduct of affairs with foreign sovereignties"); *United States v. Arjona*, 120 U.S. 479, 487 (1887) (power to define and punish violations of the Law of Nations is "conferred by the constitution on the government of the United States exclusively").

In light of the "imperative[] * * * that federal power in the field affecting foreign relations be left entirely free from local interference," Hines, 312 U.S. at 63, the Supreme Court has held that state "regulations must give way if they impair the effective exercise of the Nation's foreign policy," *Zschernig v. Miller*, 389 U.S. 429, 440 (1968).

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United States," *id.*, Art. II, § 2, cl. 1, and gives him the authority to "make Treaties" and "appoint Ambassadors" with the "Advice and Consent of the Senate," *id.*, cl. 2, and to "receive Ambassadors and other public Ministers," *id.*, § 3.

The Constitution also confers upon Congress the authority "[t]o lay and collect * * * Duties, Imposts and Excises," and "provide for the common Defence," U.S. Const. Art. I, § 8, cl. 1, "[t]o establish a uniform Rule of Naturalization," *id.*, cl. 4, "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," *id.*, cl. 11, "[t]o raise and support Armies," *id.* cl. 12, "[t]o provide and maintain a Navy," *id.* cl. 13, and to regulate "the land and naval forces," *id.* cl. 14.

[3] The Constitution provides that "[n]o State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal" or, without the consent of Congress, "lay any Imposts or Duties on Imports or Exports," "keep Troops or Ships of War in time of Peace," "enter into any Agreement or Compact * * * with a foreign Power," or "engage in War, unless actually invaded." U.S. Const. Art. 1, § 10.

*Appendix F*

Because the conduct of foreign policy is committed to the Federal Government, and because of the unique concerns raised by state action in that arena, federal preemption of a state law concerning foreign affairs may be more readily inferred than in the domestic context where federal and state governments share regulatory authority. When the States act in an area in which federal interests predominate, "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption when Congress legislates in a field which the states have traditionally occupied." *Boyle v. United Technologies Corp.*, 487 U.S. 500, 507 (1988) (quotation omitted). "Preemption of a whole field * * * will be inferred where the field is one in which 'the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Thus, when a State legislates in an area affecting foreign affairs, the courts are "more ready to conclude that a federal Act * * * supersede[s] state regulation." *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Bd.*, 315 U.S. 740, 749 (1942).

Just as the Supreme Court is more willing to infer affirmative preemption when a state statute intrudes into the foreign policy arena, the Court has also made clear that a state law that directly implicates the conduct of foreign policy will be set aside even if there is no affirmative preemption. In *Zschernig v. Miller*, the Supreme Court made clear that a state policy that disturbs foreign relations must give way "even in [the] absence of a treaty" or federal statute. 389 U.S. at 441. *See also* Laurence H. Tribe, *American Constitutional Law*, § 4-5 at 656 (3d ed. 2000) ("all state action, whether or not consistent with current foreign policy, that distorts the allocation of responsibility to the national government for the conduct of American diplomacy is void as an unconstitutional

infringement on an exclusively federal sphere of responsibility").

The California forced labor statute has far more than an "incidental or indirect effect in foreign countries." *Zschernig*, 389 U.S. at 434-35. Rather, the State has deliberately undertaken the formulation of foreign policy in an area subject to international treaty obligations, adopting a strategy that directly impairs the accomplishment of federal policy and prevents the nation from speaking with one voice on a matter of international concern.

Because the policy reflected in California's forced labor statute is in direct tension with the nation's foreign policy expressed in the 1951 Treaty of Peace, the state statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of federal policy and is, thus, affirmatively preempted. *Hines*, 312 U.S. at 67; *Crosby v. National Foreign Trade Council,* 530 U.S. 363, 373 (2000). However, even if the Court were to conclude that the forced labor statute has not been affirmatively preempted, it is plain that the statute in design and effect impermissibly intrudes into the conduct of foreign affairs and is therefore beyond the authority of the State to enact.

B. Federal Law Preempts California's Forced Labor Statute, Which Stands As An Obstacle To Achieving The United States' Foreign Policy Established In The 1951 Treaty Of Peace.

The 1951 Treaty of Peace reflects the President and Senate's considered judgment that all claims arising out of Japan and Japanese nationals' conduct in the course of World War II, including claims between private individuals, should be resolved through inter-governmental negotiations. The Allied parties to the Treaty, including the United States, expressly "waive all * * * claims of the Allied Powers *and their nationals* arising out of any actions taken by Japan *and its nationals* in the

course of the prosecution of the war." Art. 14(a) (emphasis added). The Treaty of Peace likewise provides that the claims of Korea and China, and those of their nationals, will be resolved through inter-governmental agreements rather than litigation. While the Treaty may not be directly binding on Korea and China, who were not parties to the Treaty, the Treaty does establish the law of the United States with respect to the war-related claims of Korean and Chinese nationals. Indeed, it would be ironic to think that the United States foreclosed the war-related claims of its own nationals while leaving its courts open to litigating the claims of foreign nationals.

As noted above, the Treaty of Peace both ensured for Korea and China the same benefit as the Allied parties had obtained for themselves and directed that war-related claims of Koreans and Chinese, like those of Allied nationals, would be settled on a government-to-government basis. Japan was required to renounce its interests in Korea and China, and the Korean and Chinese authorities were allowed to seize and liquidate all Japanese assets within their territories — assets worth billions of dollars. *See* Art. 4(b) (Korea); Art. 10, 14(a)(2), 21 (China). In return, both Korea and China were expected to settle, as the Allied parties had, the war-related claims of themselves and their nationals against Japan and its nationals. *See* Art. 4(a) ("claims * * * of [Korean] authorities and residents against Japan and its nationals, shall be the subject of special arrangements between Japan and [Korean] authorities"); Art. 26 (providing that Japan was to enter a peace treaty with China, settling the war "*on the same or substantially the same terms as are provided for in the present Treaty*" (emphasis added)).

California's forced labor statute runs directly contrary to the United States' foreign policy of relegating the war-related claims of Korean and Chinese nationals to inter-governmental resolution. Whereas federal law provides that the claims of Korean and Chinese nationals, like those of Americans themselves, are to be resolved by government-to-government

settlements, the California statute grants such claims a preferred status, with uniquely favorable substantive and procedural rules. *See, e.g.*, Cal. Code Civ. Pro. § 354.6(a)(3) (affixing damages in a manner to eliminate the effect of post-war inflation), § 354.6(b) (making corporations doing business in California liable for the debts of their Japanese affiliates, without regard to traditional principles of corporate identity), § 354.6(c) (setting aside generally-applicable statutes of limitations in favor of an 81-year limitations period).

The district court mistakenly believed that the federal Treaty could preempt the California statute with respect to plaintiffs' claims only if the Treaty itself actually resolved the Korean and Chinese claims. *See In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1160, 1165-68 (N.D. Cal. 2001). Thus, the district court found it conclusive that the Treaty itself did not "waive the claims of the Korean and Chinese plaintiffs." *Id.* at 1165. *See also id.* at 1168 (Treaty does not "control claims of individuals from non-signatory nations"). This misconceives the nature of both the Treaty and federal preemption. It is not necessary for the Treaty to finally resolve plaintiffs' claim in order for the federal law to preempt California's attempt to encourage litigation of those claims. It is sufficient that the Treaty establishes, as a matter of United States law, that plaintiffs' claims are to be resolved by inter-governmental arrangements, rather than litigation. It is irrelevant, therefore, whether, as a matter of Korean or Chinese law, plaintiffs could pursue their claims in the courts of those nations; they may not, consistent with the United States' policy adopted in the Treaty, pursue their claims in the courts of the United States. The California statute plainly "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the Treaty. *Hines*, 312 U.S. at 61; *Crosby*, 520 U.S. at 373-77 & n.10 (rejecting as "cramped," Massachusetts' argument that the Federal Burma Act had given the President had flexibility over *federal* sanctions but "implicitly left control over state sanctions to the State").

C. Even if Not Affirmatively Preempted, the California Forced Labor Statute Is an Unconstitutional Intrusion Into the Conduct of Foreign Affairs.

The Supreme Court has established that, even apart from statutory preemption, the Constitution's commitment to the Federal Government of the exclusive responsibility for conducting the nation's foreign affairs acts as an independent constraint on state activity. Thus, "even in [the] absence of a treaty" or federal statute, a state policy that disturbs foreign relations must be set aside. *Zschernig*, 389 U.S. at 441. *See also Chy Lung v. Freeman,* 92 U.S. 275 (1875) (striking down California statute requiring ship to post bond for certain foreign immigrants without finding conflict with any federal statute or treaty). It is not a question of "balanc[ing] the nation's interest in a uniform foreign policy against the particular interests of a particular state"; rather, "there is a threshold level of involvement in and impact on foreign affairs which the states may not exceed." *National Foreign Trade Council v. Natsios,* 181 F.3d 38, 52 (1st Cir. 1999), *aff'd*, 530 U.S. 363 (2000).

*Zschernig* is illustrative. In that case, the Supreme Court struck down an Oregon probate law that prevented the distribution of estates to foreign heirs if, under foreign law, the proceeds of the estate were subject to confiscation. 389 U.S. at 431. The Court noted that application of the statute required state courts to engage in "minute inquiries concerning the actual administration of foreign law" and to judge the credibility and good faith of foreign counsels, *id.* at 435, with outcomes turning upon "foreign policy attitudes" regarding the Cold War, *id.* at 437. Accordingly, the Court concluded that the statute had "a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems." *Id.* at 441. The Court held that this "kind of state involvement in foreign affairs and international relations — matters which the Constitution entrusts solely to the Federal Government" — was "forbidden state activity." *Id.* at 436.

*Appendix F*

The California forced labor statute represents a similar impermissible intrusion into the Federal Government's authority to regulate foreign affairs. California is plainly of the view that Japanese companies' use of unpaid forced labor, even if condoned by the Imperial Japanese government, violated principles of international human rights law. But under our constitutional scheme, only the Federal Government has the authority to prescribe penalties for foreign violations of international law. *See* U.S. Const. Art. 1, § 8, cl. 10; *United States v. Arjona,* 120 U.S. 479, 487 (1887).

This is particularly so where, as here, the international law violations at issue were committed in conjunction with a foreign government during the course of a war against the United States. As the Supreme Court has recognized, war-related claims, including the claims of nationals, are frequently the subject of government-to-government negotiations at the conclusion of hostilities. *See, e.g., United States v. The Schooner Peggy,* 5 U.S. (1 Cranch) 103 (1801) (upholding the Federal Government's power to abolish, by way of treaty, private prize claims against foreign property); *Ware v. Hylton,* 3 U.S. (3 Dall.) 199, 230 (1796) (refusing to adjudicate a personal debt, confiscated by Virginia during the Revolutionary War, because the treaty of peace concluding the war had not provided for such claims). The decision whether to risk continued animosity with a foreign power by creating claims in American courts arising out of foreign nationals' participation in their government's atrocities is a determination that only the Federal Government is authorized to make. *See Pink*, 315 U.S. at 225 (noting that "the existence of unpaid claims against Russia *and its nationals* which were held in this country * * * had long been one impediment to resumption of friendly relations between these two great powers" (emphasis added)).

Even a State with the best of intentions lacks the resources and breadth of view necessary to assess the impact of punishing particular international law violations on the United States'

multi-faceted international interests. *See, e.g., Crosby v. National Foreign Trade Council,* 530 U.S. 363, 381-82 (2000) (observing that independent state activity would undermine President's ability to coordinate the country's multi-pronged policy of encouraging democratic change in Burma through enticements, threats, and cooperation with other foreign nations). A state legislature is in a poor position to assess what risks to our relations with Germany and Japan are entailed by a statute that aims to redress the wrongs of World War II, or to weigh those risks against other foreign policy objectives that depend upon the good will of those governments. The interests of the nation as a whole should not be made dependent upon the judgment of any one State which lacks both the responsibility and the capacity to formulate foreign policy.

Plainly, the California legislature has engaged in a policy-oriented balancing of interests and decided that the benefits of adopting a law with respect to German and Japanese forced labor claims were worth the risks entailed in antagonizing the target companies and the German and Japanese governments. As to the States, such foreign policy debates are "forbidden activity." *Zschernig*, 389 U.S. at 435-36.[4] Like other state statutes that have been held invalid under *Zschernig*, this statute

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[4] At the time of the bill's signing, the provision's author made clear that the statute was intended to influence the conduct of the United States and German governments in their discussions relating to Holocaust-era claims:

> [Section 354.6] *sends a very powerful message from California to the U.S. government and the German government,* who are in the midst of rather closed negotiations about a settlement. * * * If the international negotiators want to avoid very expensive litigation by survivors * * *, they ought to settle. * * * Otherwise, this law allows us to go ahead and take them to court.

*See* Henry Weinstein, *Bill Signed Bolstering Holocaust-Era Claims*, Los Angeles Times, July 29, 1999, at A3 (1999 WL 2181642) (emphasis added).

unacceptably compromises the nation's interest in having its foreign policy conducted by a national government responsible to the citizens of all states. *See Natsios,* 181 F.3d at 53 (Massachusetts statute restricting the ability of state agencies to purchase goods or services from companies that also did business in Burma was specifically designed to affect the affairs of a foreign country); *Miami Light Project v. Miami-Dade County,* 97 F. Supp. 2d 1174, 1176-77, 1180 (S.D. Fla. 2000) (by requiring public contractors to certify that neither they nor their subcontractors had engaged in commerce with Cuba, Cuban products or Cuban nationals, county had impermissibly inserted itself into a "hotbed of foreign affairs" with the intent to "protest and condemn Cuba's totalitarian regime"); *Tayyari v. New Mexico State Univ.,* 495 F. Supp. 1365, 1376-80 (1980) (state university's policy of denying admission to Iranian students in retaliation for the Iranian hostage crisis intruded upon "the arenas of foreign affairs and immigration policy, interrelated matters entrusted exclusively to the federal government"); *Springfield Rare Coin Galleries, Inc. v. Johnson,* 503 N.E.2d 300, 302-03 (Ill. 1986) (state law regarding the sale of South African coins was unconstitutional where adopted "as an expression of disapproval of that nation's policies"); *New York Times Co. v. City of New York Comm'n on Human Rights,* 361 N.E.2d 963, 968 (N.Y. 1977) (striking down prohibition on advertising jobs in South Africa as an impermissible intrusion upon foreign relations). *Compare Trojan Technologies, Inc. v. Pennsylvania,* 916 F.2d 903, 913-14 (3d Cir. 1990) (upholding state "Buy America" statute in part because the law did not involve evaluation of specific foreign nations), *cert. denied,* 501 U.S. 1212 (1991).

Further, as with the Massachusetts Burma statute, the potential foreign policy impact of California's forced labor statute must be assessed within the "broader pattern of state and local intrusion." *Natsios*, 181 F.3d at 53. If California is free to redress the wrongs associated with forced labor during World War II, then each State is free to adopt similar — or even

inconsistent — laws relating to their preferred foreign human rights issue, whether it be repression in Burma, *cf. Natsios*, 181 F.3d at 53, or communism in Cuba, *cf. Miami Light Project*, 97 F. Supp. 2d at 1180. In addition to violating the territorial limitations on state jurisdiction, discussed below, such a rule would severely undermine American foreign policy. Individual States cannot be permitted to force their favored issues or preferred resolutions into the Federal Government's diplomacy. *See Crosby*, 530 U.S. at 382-83 (observing that Massachusetts had undermined federal policy toward Burma by making the state law the focus of diplomacy, rather than Burma's conduct).

As discussed above, the conflict with federal policy in this case is real and direct. The Federal Government made the determination at the conclusion of World War II that the nation's strategic need for a strong, democratic ally against communism in Asia required that claims against Japan and Japanese companies be resolved finally through inter-governmental negotiations. Thus, the Allies, including the United States, foreclosed litigation of their nationals' war-related claims in exchange for the right to confiscate and distribute Japanese assets within their territory. The Allies directed that the claims of Korean and Chinese nationals be dealt with similarly. California's forced labor statute moves in precisely the opposite direction, encouraging and facilitating litigation of the exact claims that the federal policy seeks to bar.

Actual adjudication of plaintiffs' claims would draw the courts even deeper into the terrain of foreign affairs. The court would be called upon to adjudicate whether Japan's bilateral treaties with South Korea and the Republic of China do, in fact, resolve plaintiffs' legal claims. If the parties to those agreements disagree on their meaning, a court ruling either way might well inflame simmering international disputes. Moreover, a finding that the treaties had not finally resolved those claims would be equivalent to a determination that Japan violated its obligations under the terms of the 1951 Treaty of

Peace. An individual state legislature cannot interject its courts into such foreign policy thickets. *See Zschernig*, 389 U.S. at 435-37.

Plaintiffs mistakenly contend that this Court's opinion in *Gerling Global Reins. Corp. of America v. Low*, 240 F.3d 739 (9th Cir. 2001) ("*Gerling-Low*") controls the foreign affairs analysis in this case. As the district court explained, the *Gerling-Low* decision turned on factors that, in this case, require dismissal of plaintiffs' claims. In *Gerling-Low*, the Court found that the disclosure provisions of the HVIRA were related to the State's *domestic* interest in monitoring the bona fides of insurance companies doing business in the State. 240 F.3d at 744-45. A disclosure requirement alone, the Court stated, would not affect the "decision making authority" of insurance companies "to pay or not to pay claims." *Ibid.* Moreover, Congress had, in the Court's view, "expressly delegated to the states the power to regulate insurance," *id.* at 744-46 (citing the McCarran-Ferguson Act), and had even "embrace[d] state legislation like HVIRA," *id.* at 748 (citing the U.S. Holocaust Assets Commission Act of 1988).

The California forced labor statute, in contrast, is an attempt to force foreign companies and their affiliates to pay damages, according to a formula determined by the California legislature, for wrongs committed in foreign lands.[5] Federal policy is precisely to the contrary. Thus, the forced labor statute is quite distinct from the HVIRA, as construed by the Court, and more akin to those provisions of California insurance law that the Court specifically declined to address in the *Gerling-Low* decision. *See* 240 F.3d at 745 (reserving "for another day" consideration of the constitutionality of California Ins. Code

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[5] As described further below, *infra* at 31, plaintiffs' and the State of California's characterization of Section 354.6 as merely a "statute of limitations" cannot be squared with the provision's language.

§ 790.15, which authorizes license suspensions of insurance companies who have not paid Holocaust-era claims, and Cal. Civ. Proc. Code § 354.5, which allows claims for payment on Holocaust-era insurance policies issued in Europe).

Plaintiffs would construe the *Gerling-Low* ruling so broadly as to overturn the Supreme Court's *Zschernig* decision. In plaintiffs' view, the *Gerling-Low* court held *Zschernig* inapplicable wherever the defendants are simply businesses and no foreign government has been named as a defendant, and where the statute at issue is not directed at a particular country. *See* Kim Br. at 25. Under this construction, the *Gerling-Low* opinion necessarily overruled the holding in *Zschernig* because no foreign government was a party to the litigation in Zschernig, and the statutes there at issue were not, on their face, directed at any particular country. *See Zschernig*, 389 U.S. at 430, 432.[6] Plainly, this Court did not purport to overrule Supreme Court precedent. *See Agostini v. Felton,* 521 U.S. 203, 237 (1997); *United States v. Pacheco-Zepeda,* 234 F.3d 411, 414 (9th Cir. 2000).

## II. THE CALIFORNIA WORLD WAR II FORCED LABOR STATUTE IS EXTRATERRITORIAL LEGISLATION THAT IS BEYOND THE AUTHORITY OF THE STATE TO ENACT.

In addition to Section 354.6's impermissible interference with federal foreign policy, the state statute also violates the federal Constitution's prohibition on States attempting to project their legislative jurisdiction beyond their borders.

A. The Commerce Clause of the federal Constitution "has long been understood" not only as an affirmative grant of authority to the Federal Government, but as a constraint upon

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[6] Even if this were the test, Section 354.6 is, in fact, expressly directed at particular foreign countries: "Nazi [Germany], its allies or sympathizers."

the power of the States, which "'provide[s] protection from state legislation inimical to the national commerce [even] where Congress has not acted.'" *Barclays Bank PLC v. Franchise Tax Board,* 512 U.S. 298, 310 (1994) (quoting *Southern Pacific Co. v. Arizona,* 325 U.S. 761, 769 (1945)).

As the Supreme Court has explained, the Commerce Clause precludes a State from applying its law "to commerce that takes place wholly outside of the State's borders." *Edgar v. MITE Corp.,* 457 U.S. 624, 642-43 (1982) (plurality opinion). *See also BMW of North America, Inc. v. Gore,* 517 U.S. 559, 572 (1996) (State may not "impose economic sanctions on violators of its laws with the intent of changing the [violator's] lawful conduct in other States"). Extraterritorial regulation "exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." *Healy v. Beer Institute,* 491 U.S. 324, 336 (1989).

These principles apply with particular force in the international arena, and the Supreme Court has recognized that the dormant Foreign Commerce Clause prevents States from regulating commerce in a manner that "prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.'" *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 451 (1979) (quoting *Michelin Tire Corp. v. Wages,* 423 U.S. 276, 285 (1976)). A state statute "will violate the 'one voice' standard if it *either* implicates foreign policy issues which must be left to the Federal Government or violates a clear federal directive." *Container Corp. v. Franchise Tax Bd.,* 463 U.S. 159, 194 (1983)

Similar principles, inherent in the constitutional requirement of due process, also limit a State's ability to project its law beyond its borders. *See Allstate Ins. Co. v. Hague,* 449 U.S. 302, 310-11 (1981) (plurality) ("if a State has only an insignificant contact with the parties and the occurrence or

transaction, application of its law is unconstitutional"); *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 818 (1985); *Home Insurance Co. v. Dick,* 281 U.S. 397, 407-08 (1930). *See also Quill Corp. v. North Dakota,* 504 U.S. 298, 306 (1992) ("[t]he Due Process Clause 'requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax'" (citation omitted)). The due process limitations on a State's extraterritorial legislation look "not only at whether the *parties* * * * have contacts with [the State], but also and more importantly * * * at whether the subject [of the legislation] has a sufficient nexus to [the State]." *Gerling Global Reinsurance Corp. of America v. Gallagher,* 267 F.3d 1228, 1238 (11th Cir. 2001) ("*Gerling-Gallagher*").

Applying these principles, the Eleventh Circuit in *Gerling-Gallagher* recently enjoined application of a Florida statute that attempted to force European insurance companies and their Florida affiliates to pay on insurance policies issued in Europe prior to and during World War II. *See Gerling-Gallagher,* 267 F.3d at 1238. The court explained it was insufficient that, subsequent to the Holocaust, some victims had moved to Florida or that affiliates of the European insurers did business in Florida. *Ibid.* The State lacked a sufficient nexus to "the *subject*" of the legislation - "the German affiliates' payment or non-payment of Holocaust-era policy claims." *Ibid.*

B. In enacting its Second World War forced labor statute, the California legislature sought to create and define a cause of action to provide compensation for victims of German and Japanese forced labor practices during World War II. Section 354.6 establishes the cause of action, Cal. Civ. Pro. § 354.6(b), defines the class of plaintiffs who may sue, *id.* § 354.6(a)(1), (2), affixes the measure of damages (eliminating the effect of post-war inflation), *id.* § 354.6(a)(3), makes corporations doing business in California liable for the debts of their Asian and European affiliates, without regard to traditional principles of corporate identity, *id.* § 354.6(b), and sets aside generally-

applicable statutes of limitations, substituting an 81-year statute of limitations that extends to 2010, *id.* § 354.6(c).

Contrary to plaintiffs' and the California Attorney General's suggestion, the statute thus is considerably more than a state "statute of limitations." Indeed, the paragraph that establishes the limitations period expressly disavows any general application to causes of action that arise under other provisions of substantive law. To the contrary, the limitations provision applies only to "[a]ny action *brought under this section.*" *Id.* § 354.6(c) (emphasis added).

The principles outlined above plainly preclude this extraterritorial legislation. As noted, both the "dormant" Commerce Clause and the Due Process Clause prohibit a State from projecting its laws into other jurisdictions. *See Healy v. Beer Institute,* 491 U.S. 324, 336 (1989) (Commerce Clause); *Home Insurance Co. v. Dick,* 281 U.S. 397, 407-08 (1930) (Due Process Clause). The California legislature can no more regulate conduct that takes place in Asia or legislate what damages should be paid for such conduct, than it can impose its regulatory policies on New York.

Section 354.6 applies to conduct in territory "conquered by the Nazi regime, its allies or sympathizers" at any time during World War II. *See* Cal. Civ. Pro. § 354.6(a)(2). By definition, therefore, the statute applies only to conduct that occurred outside of California. Nor does the statute represent an attempt to afford protection to California citizens victimized in foreign nations. The statute seeks to provide relief to persons "taken from a concentration camp or ghetto" in Europe, or "member[s] of the civilian population[s] conquered by the Nazi regime, its allies or sympathizers." *Id.* § 354.6(a). Indeed, with respect to claims concerning the Pacific Theater, the *only conceivable* plaintiffs are individuals who were not nationals of the United States in 1951, when the United States explicitly waived all such claims. Although some of the named plaintiffs may subsequently have moved to California, it is well-established

that the mere presence of the parties in a State is not an adequate basis for that State to apply its substantive law to activity with no other significant contact with the State. *Allstate Ins. Co.*, 449 U.S. at 310-11 (citing *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178 (1936)).

C. Plaintiffs cannot avoid the territorial limitations of the Commerce and Due Process Clauses by arguing that Section 354.6 merely authorizes suit against conduct that violated universal norms of international law. *Cf.* Kim Br. at 36-38. As discussed above, the authority to "define and punish Offences against the Law of Nations," U.S. Const. Art. I, § 8, cl. 10, is "conferred by the constitution on the government of the United States exclusively." *United States v. Arjona*, 120 U.S. 479, 487 (1887).[7] Thus, it is beyond the authority of the California legislature to provide redress for violations of international law beyond what remedies might be provided by federal law. *See also* The Federalist, No. 3 (Jay) (Rossiter ed. 1961) 43 (in contrast to the Articles of Confederation, where each State had independent authority to adjudicate points of international law, "[u]nder the national government, * * * the laws of nations will always be expounded in one sense and executed in the same manner").

Plaintiffs' reliance on the history of state courts exercising jurisdiction over "transitory" torts, *cf.* Kim Br. at 33-34, is misplaced. As the Second Circuit explained in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), upon which plaintiffs rely, a state court may provide a remedy for foreign conduct only "as long as the conduct complained of was unlawful where performed," *id.* at 885. *See also ibid.* (exercise of jurisdiction over transitory torts "is an expression of comity to give effect to

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[7] Of course, the States retain jurisdiction to prescribe and punish conduct that occurs in their own territory that might also violate international law. *See Arjona*, 120 U.S. at 487.

the laws of the state where the wrong occurred"). Here, in contrast, plaintiffs' Complaints acknowledge the full cooperation and involvement of the Imperial Japanese government in defendants' alleged conduct. *See, e.g.*, ER 12, 43-44, 98.

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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Dated: June 6, 2002

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